No. 02-196-CFX Title: National Park Hospitality Association, Petitioner
v.
Department of the Interior, et al.

Docketed: August 8, 2002 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Aug 6 2002	Petition for writ of certiorari filed. (Response due October 9, 2002)
	Sep 6 2002	Order extending time to file response to petition until October 9, 2002.
	Sep 6 2002	This extension of time is granted for all respondents.
	Oct 9 2002	Brief of respondent Department of the Interior in opposition filed.
	Oct 22 2002	Reply brief of petitioner National Park Hospitality Association filed.
	Oct 23 2002	DISTRIBUTED for Conference of November 8, 2002
	Nov 12 2002	Petition GRANTED. SET FOR ARGUMENT March 4, 2003. **********
	Dec 27 2002	Joint appendix filed.
	Dec 27 2002	Brief of petitioner National Park Hospitality Association filed.
	Dec 27 2002	Brief of respondent Xanterra Parks & Resorts, LLC in support of petition filed.
	Dec 27 2002	Lodging consisting of twenty bound copies of related documents received from counsel for the respondent Xanterra
	Jan 10 2003	CIRCULATED.
	Jan 27 2003	Brief of respondents U.S. Department of the Interior, et al. filed.
	Jan 27 2003	LODGING consisting of twenty copies of related material received from the Solicitor General and distributed.
	Feb 21 2003	Reply brief of petitioner National Park Hospitality Association filed.
	Feb 25 2003	Reply brief of respondent Xanterra Parks & Resorts, LLC filed.
	Mar 4 2003	ARGUED.

Supreme Court, U.S.
FILED

02 196 AUG 6 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, applies to contracts between the National Park Service and private parties for the development, operation, and maintenance of concessions, such as restaurants, lodges, and gift shops, in the national parks.

RULE 14.1(b) STATEMENT

In addition to the National Park Hospitality Association, plaintiffs/appellants in the court of appeals (in four consolidated cases) were Amfac Resorts L.L.C. (since renamed Xanterra Parks and Resorts L.L.C.), ARAMARK Sports and Entertainment Services, Inc., and Hamilton Stores, Inc. In addition to the United States Department of the Interior, respondents are Gale Norton, Secretary of the Interior, Fran P. Mainella, Director of the National Park Service, and Delaware North Park Services, Inc. (which intervened as a defendant in this and one of the consolidated cases).

RULE 29.6 STATEMENT

The National Park Hospitality Association ("NPHA") is a non-profit trade association that has no parent corporations or stock. The NPHA represents concessioners who operate concessions, such as restaurants, lodges, recreational services, and gift shops, in the national parks.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

A. The Decision Below Is Clearly Incorrect And Is Contrary To The Views Of The Comptroller General And The Department Of Interior's Own Board Of Contract Appeals. 8

B. The Decision Below Creates A Conflict In The Circuits On Whether The Contract Disputes Act Applies To Concessions Contracts 16

C. The Issue Presented Here Is Of Substantial Practical Importance. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215 (1945) 12

Grunley Constr. Co., ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998) 11

Harry Pohl KG, ASBCA No. 51523, 01-1 BCA ¶¶ 31,329, 2001 ASBCA LEXIS 40 (Feb. 28, 2001) 20

Home Entm't, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 ASBCA LEXIS 126 (Aug. 23, 1999) 20

J.E.M. AG Supply, Inc. v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593 (2001) 12

Libra Eng'g Inc., NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984) 11

Nat'l Park Concessions, Inc., IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994) 12

Niko Contracting Co. v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table) 11

Oroville-Tonasket Irrigation Dist. v. *United States*, 33 Fed. Cl. 14 (1995) 4, 18, 20

Pound v. *United States*, No. 94-496C, slip op. (Fed. Cl. Aug. 30, 1996) 15, 16, 20

R & R Enters., IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989) 12

TABLE OF AUTHORITIES – continued

Page(s)

Senor Tenedor, S.A. de C.V., ASBCA Nos. 48502 *et al*, 97-2 BCA ¶ 29,192, 1997 ASBCA LEXIS 150 (Aug. 15, 1997) 20

Starfleet Marine Transp., Inc., B-290181, 2002 U.S. Comp. Gen. LEXIS 90 (July 5, 2002) 14, 15

Stephen Sloan Marine Corp., B-234219, 89-1 C.P.D. ¶ 435 (May 9, 1989) 13

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 16, 17, 18, 20

Total Procurement Services, Inc., B-255934.3, 1994 WL 450445 (Aug. 16, 1994) 13

United States v. *Rodgers*, 466 U.S. 475 (1984) 12

United States v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) 20

Watch Hill Concessions Inc., IBCA No. 5284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911 (Feb. 16 2001) 12, 13

West Coast Copy, Inc.; B-254044.2, 1993 WL 476970 (Nov. 16, 1993) 14

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 11, 16, 17, 18

YRT Services Corp. v. *United States*, 28 Fed. Cl. 366 (1993) 13, 15

STATUTES, RULES AND REGULATIONS

An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916). 4

TABLE OF AUTHORITIES – continued

Page(s)

16 U.S.C. § 1 ..... *passim*

National Parks Service Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969 (1965) 2, 5

16 U.S.C. § 20d 5

National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 5

16 U.S.C. § 5951 ..... *passim*

16 U.S.C. § 5952 ..... 6, 9, 17

16 U.S.C. § 5954 10

28 U.S.C. § 1254 1

Competition In Contracting Act of 1984, Pub. L. 98-369, 98 Stat. 1175 (codified at 31 U.S.C. §§ 3551-3556, 41 U.S.C. § 253) 13

31 U.S.C. § 3551 15

41 U.S.C. § 253 15

40 U.S.C. § 276a 12

41 U.S.C. § 351 12

Contract Disputes Act, 41 U.S.C. § 601-613 ..... *passim*

41 U.S.C. § 602 ..... *passim*

41 U.S.C. § 605 3

41 U.S.C. § 606 3

41 U.S.C. § 607 ..... 3, 7, 13

41 U.S.C. § 609 ..... 4, 13

41 U.S.C. § 611 4

TABLE OF AUTHORITIES – continued

Page(s)

Concession Contracts, 64 Fed. Reg. 20,630 (April 17, 2000) (codified at 36 C.F.R. pt. 51) 4, 5, 6

36 C.F.R. § 51.3 ..... 2, 6, 7, 12

Standard Concession Contract, 65 Fed. Reg. 26,052 (May 4, 2000) 6, 9, 10

MISCELLANEOUS

H.R. REP. NO. 95-1556 3

C. KIPPS, T. KINDNESS, & C. HAMRICK, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L.J. 585 (1999) 19, 20

Encourage Contracting Out of Federal Services: A Legislative Hearing on H.R. 3832, The Services Acquisition Reform Act of 2002 (SARA), Before the Subcomm. on Technology and Procurement Policy, House Comm. on Gov't Reform, 107th Cong. (Mar. 7, 2002) 18

S. REP. NO. 89-765, 1965 U.S.C.C.A.N. 3489 5

S. REP. NO. 95-1118, 1978 U.S.C.C.A.N. 5235 ..... 3, 19, 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the National Park Hospitality Association ("NPHA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 282 F.3d 818. The Memorandum Opinion of the district court addressing the issue before this Court (App., *infra*, 35a-92a) is reported at 142 F. Supp. 2d 54. Other opinions issued by the district court are reported at 143 F. Supp. 2d 7 and 150 F. Supp. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002, and a timely petition for rehearing was denied on May 8, 2002 (App., *infra*, 93a-94a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a), provides:

> (a) Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for –
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

36 C.F.R. § 51.3 provides in relevant part:

> *A concession contract (or contract)* means a binding written agreement between the Director [of the National Park Service] and a concessioner entered under the authority of this part or the [National Park Concessions Policies Act of 1965, Pub. L. No. 89-249] that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. *Concession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contact Disputes Act)* and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

(second emphasis added).

STATEMENT

This case concerns the applicability of the Contract Disputes Act of 1978 ("CDA") to concessions contracts, and in particular to contracts between the National Park Service ("NPS") and the private concessioners who contract to provide visitor services and to operate and maintain facilities in the national parks. The language of the CDA broadly covers all contracts entered into by a federal agency for the procurement of personal property, services, or the repair and maintenance of real property. Despite the CDA's breadth, the NPS has asserted by regulation that the statute does not apply to its concessions contracts. In upholding that regulation, the District of Columbia Circuit disagreed with the Federal Circuit's interpretation of the CDA and ignored the views of the Department of the Interior's own Board of Contract Appeals. Furthermore, the Comptroller General has specifically questioned the D.C. Circuit's reasoning.

As Congress recognized when it passed the CDA, "[h]ow [government] procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs." S. REP. NO. 95-1118, at 4, 1978 U.S.C.C.A.N. 5235, 5238. Given the importance of the CDA to government contracting – and the court of appeals' cramped interpretation of the scope of this important federal statute – review by this Court is plainly warranted.

1. The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613, on its face applies to *all* government contracts for "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(2)-(3). The statute was designed to replace a system of dispute resolution procedures based on "[t]he predilections of different agencies" (S. REP. NO. 95-1118, at 3) that was "often too expensive and time consuming for the efficient and cost-effective resolution of small claims and, on the other hand, often fail[ed] to provide the procedural safeguards and other elements of due process that should be the rights of litigants" (*id.* at 4). Thus, the CDA has "broad application in order to unify the diverse and often inconsistent procedures presently existing among the many procuring agencies." *Id.* at 17.

The CDA "provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." *Id.* at 1; see also H.R. REP. NO. 95-1556, at 5. Under the CDA, parties contracting with the government have a number of important procedural and substantive rights. The CDA establishes that all claims "relating to" a contract covered by the CDA are subject to the Act's administrative dispute processes. See 41 U.S.C. § 605(a). Those processes provide contractors with neutral arbiters to review decisions reached by the agency's contracting officer. In particular, the contractor has the choice either to appeal any decision to the agency's "Board of Contract Appeals" (see 41 U.S.C. §§ 606, 607)) or to remove the mat-

ter to the Court of Federal Claims (see 41 U.S.C. § 609(a)(1)), which is statutorily required to review the agency's decision "de novo" (41 U.S.C. § 609(a)(3)). Substantively, a major advantage of the CDA over the hodgepodge of dispute-resolution schemes it replaced is that contractors are entitled to interest on any amount found due to them on their claims. See 41 U.S.C. § 611; *Oroville-Tonasket Irrigation Dist.* v. *United States*, 33 Fed. Cl. 14, 23 n.3 (1995).

2. The NPS was created in 1916 "to oversee our national parks and to 'conserve the scenery and the natural and historic objects and the wild life therein and * * * provide for the enjoyment of the same.'" App., *infra*, 49a (quoting 16 U.S.C. § 1 (omission in original)). In the Act creating the NPS, "Congress authorized the Interior Secretary to 'grant privileges, leases, and permits for the use of land for the accommodation of visitors' to each of the 'various parks, monuments, or other reservations' under the Secretary's authority." App., *infra*, 2a (quoting An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916)).

"[P]rovid[ing] for the enjoyment" of the national parks (16 U.S.C. § 1) generally requires that visitors both be offered various services throughout the parks and be provided access to facilities, such as lodges, restaurants, and retail outlets, where those services are delivered. Because the government has been unable or unwilling to undertake on its own behalf the huge financial burdens and other responsibilities associated with the provision of these visitor services and facilities, throughout its history the NPS has relied on private concessions contractors to build, maintain, and operate its visitor-service facilities and to provide many of the other services that the public typically associates with a national park, such as outfitter and guide services. See App., *infra*, 49a (NPS has always "relied on private concessioners for the provision of 'lodging, food, merchandising, transportation, outfitting and guiding, and similar activities.'") (quoting 64

Fed. Reg. 20,630 (Apr. 17, 2000)). The national parks concessions program, therefore, historically has been a partnership between the NPS and concessions contractors to develop and provide access to the national parks for the enjoyment of the public.

Between 1916 and 1965, there was no specific statutory scheme governing the relationship between the NPS and the concessioners that contracted to provide visitor services in the national parks. In light of growing industry and governmental concern about the NPS's concessions-contracting policies (see App., *infra*, 3a-4a), Congress enacted the National Park Service Concessions Policy Act ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965), to govern concessions contracts. The 1965 Act basically codified preexisting NPS concession policy. See S. REP. NO. 89-765, 1965 U.S.C.C.A.N. 3489, 3489 (principal purpose of the 1965 Act was "to put into statutory form policies which * * * have heretofore been followed by the [NPS] in administering concessions"). Among other things, the 1965 Act afforded concessioners a preferential right of renewal for their concessions contracts (16 U.S.C. § 20d) and authorized the NPS to grant other specified contractual inducements for making investments in the national parks. See App., *infra*, 4a, 50a-51a. In exchange, "[c]oncessioners paid the government a franchise fee * * * for the privilege of operating on federal land." *Id.* at 4a.

In 1998, Congress repealed the 1965 Act and passed a replacement statute, the National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966). The 1998 Act altered various technical aspects of the system under which the NPS enters into private concessions contracts to provide visitor services in the national parks. The 1998 Act sought to further the mission of the national park system by protecting the parks for the future while ensuring that the agency continued to provide the appropriate "ac-

commodations, facilities, and services" that are "necessary and appropriate for public use and enjoyment." See 16 U.S.C. § 5951(b)(1). In particular, the 1998 Act specified that the NPS "shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952.

The NPS has since issued regulations implementing the 1998 Act (see Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (codified at 36 C.F.R. pt. 51)), as well as a model "Standard Concession Contract" (65 Fed. Reg. 26,052 (May 4, 2000)). The regulations declare that:

> Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq*. (the Contact Disputes Act) * * *.

36 C.F.R. § 51.3.

3. In November and December 2000, the National Park Hospitality Association ("NPHA"), a non-profit trade association that represents many concessioners who do business in the national parks, and three individual concessioners filed separate actions challenging aspects of the NPS regulations and Standard Concession Contract. Among other claims, the NPHA and the individual plaintiffs (collectively, "NPHA") challenged 36 C.F.R. § 51.3 as being contrary to the CDA. The NPHA alleged that the regulation improperly excluded NPS concessions contracts from the CDA, despite (1) the CDA's plain language, legislative purpose, and legislative history; (2) contrary decisions of the Federal Circuit and its predecessor (the Court of Claims); (3) contrary decisions of the Court of Federal Claims and the Department of Interior's Board of Contract Appeals ("IBCA"); (4) the position taken by the NPS in at least one prior reported decision on a concessions-contract dispute; and (5) the obvious consequent ability, if the regulation were upheld, of virtually any agency to circumvent the CDA.

The cases were consolidated in the district court. On May 23, 2001, the court granted summary judgment in the NPS's favor in most respects, and in particular held that the CDA does not apply to concessions contracts. See App., *infra*, 68a-72a. The district court acknowledged that in an NPS concessions contract "the government is receiving services" and "is contracting for the provision of amenities to the visitors of its national parks" (*id.* at 68a), thus fulfilling its statutory obligation to accommodate visitors (see generally 16 U.S.C. §§ 1, 5951). The court also acknowledged that "because the concession contracts contain various terms relating to the stewardship of concession areas, * * * it can be said that the government is also bargaining for the maintenance of real property." App., *infra*, 68a. Despite these conclusions, the court determined that the CDA is ambiguous as to whether it applies to concessions contracts. See *id.* at 68a-69a. The court then afforded *Chevron* deference to the NPS and concluded that 36 C.F.R. § 51.3 was a permissible interpretation of the CDA. See App., *infra*, 70a.

The court of appeals affirmed. At the outset, the court of appeals held that the district court's rationale was erroneous: the NPS "does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions." App., *infra*, 27a.[1] Accordingly, the court of appeals agreed with the NPHA that the agency was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court upheld the determination that the CDA does not apply to concessions contracts:

> The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C.

---

[1] Congress explicitly granted authority to implement and interpret the CDA to the Administrator of the Office of Federal Procurement Policy, not to the Secretary of the Interior. See 41 U.S.C. § 607(h).

> § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

Id. at 29a. In the D.C. Circuit's view, concessions contracts do not fall within the CDA because their purpose is to benefit "park area visitors," rather than the government. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Contract Disputes Act was enacted both to standardize the federal government's contracting policies and to ensure that those who contract with the government receive fair treatment. The decision below that the CDA is inapplicable to government contracts that procure goods or services for the benefit of third parties, rather than for the government itself, cannot be squared with the plain language of the CDA and creates a gaping hole in the coverage of this important federal statute. In addition, the decision is in direct conflict with the decisions of the Federal Circuit and its predecessor, the Court of Claims, and has been rejected or questioned by the Department of Interior's own Board of Contract Appeals and by the Comptroller General. Further review is plainly warranted.

A. The Decision Below Is Clearly Incorrect And Is Contrary To The Views Of The Comptroller General And The Department Of Interior's Own Board Of Contract Appeals.

The D.C. Circuit's construction of the Contract Disputes Act is demonstrably incorrect. The CDA on its face applies to *any* "express or implied contract" entered into by "an executive agency" for "the procurement of" either "services" or the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)), unless the CDA "specifically provide[s]" otherwise. *Id.* § 602(a). The NPS does

not deny that concessions contracts are "contracts" and that it is an "executive agency," nor does it claim that the CDA itself specifically exempts these contracts. Thus, the NPS is left to assert that concessions contracts entail neither the procurement of services nor the procurement of construction, repair, or maintenance of real property. However, concessions contracts are manifestly of both these sorts.

1. The NPS plainly "procur[es] services" when it contracts with a concessioner. The NPS has a statutory duty to provide "accommodations, facilities, and services that * * * are necessary and appropriate for public use and enjoyment" of the national parks. 16 U.S.C. § 5951(b)(1); see also 16 U.S.C. § 1. Rather than undertaking these tasks itself, the NPS discharges its statutory duty by procuring the services of contractors who, subject to pervasive regulation and supervision by the agency, provide visitor services, staff park facilities, construct, maintain, and repair federally-owned structures, and perform related functions that promote the public's use and enjoyment of the national parks. For example, under section 3(a)(1) of the Standard Concession Contract, 65 Fed. Reg. at 26,064, the NPS lists for each contract the "visitor services" that the concessioner "is required to provide * * * during the term of" the contract. Similarly, section 10(a) of the Standard Concession Contract provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. Plainly, the NPS is procuring these services from concessioners.

That visitors to the national parks enjoy a benefit from concessioners' actions in no way negates the obvious fact that the government has "procur[ed] services" – among others, the discharge of its statutory duty to accommodate the public (see 16 U.S.C. §§ 1, 5952) and the upkeep of its facilities within the parks. Thus, as the district court itself acknowledged, "the government is receiving services; it is

contracting for the provision of amenities to the visitors of its national parks" (App., *infra*, 68a).

2. The NPS is also typically "procur[ing] construction, alteration, repair, or maintenance of real property" by contracting with concessioners. By statute, all the real property that concessioners construct or use in the national parks belongs to the government, not to the concessioner. See App, *infra*, 20a; 16 U.S.C. § 5954(d). Concessioners are nonetheless responsible for constructing, maintaining and repairing that property. For example, under section 9(a) of the Standard Concession Contract, 65 Fed. Reg. at 26,068, concessioners "construct or install upon lands assigned to the Concessioner * * * those real property improvements that are determined by the [NPS] to be necessary and appropriate for the conduct by the Concessioner of the visitor services required and/or authorized under [the contract]." Such real property "will immediately become the property of the United States." *Ibid.* Similarly, section 9(d) of the Standard Concession Contract requires concessioners to "undertake and complete" a "Concession Facilities Improvement Program," the specifics to be detailed in each contract. *Ibid.* Section 6(g) makes concessioners responsible for weed and pest management at concession facilities. *Id.* at 26,067. Finally, as discussed above, section 10(a) provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. It is thus beyond question that the government is procuring construction, repair, and maintenance services – as the district court again recognized (App., *infra*, 69a).

3. The D.C. Circuit nonetheless held that concessions contracts are not subject to the CDA because "[t]heir function is * * * to procure services or goods for" "park area visitors" rather than "for the government." App., *infra*, 27a. This statement is both incorrect and irrelevant.

The court of appeals' statement is incorrect because, as noted above, concessions contracts provide a "service" *to the government* by helping the NPS discharge its statutory obligation to accommodate visitors in their enjoyment of the national parks. In addition, whoever might be said to "benefit" from the provision of goods and services in the national parks, it is beyond question that *the government itself* is the principal beneficiary of the concessioners' contractual obligation to maintain and repair park facilities *owned by the government*. A contract to maintain and repair the El Tovar Hotel at Grand Canyon National Park is no different in this respect than a contract to maintain and repair the John F. Kennedy Center for the Performing Arts (see *Grunley Constr. Co.*, ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998)) or the Smithsonian Museums (see *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table); *Libra Eng'g Inc.*, NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984)).

Moreover, the court of appeals' statement is irrelevant because nothing in the CDA suggests that that statute applies only to agency contracts that procure goods, services or maintenance of real estate "for the government." App., *infra*, 27a. To the contrary, the CDA unambiguously covers *all* procurement contracts entered into by government agencies, even those that may be said to benefit third parties. As the Court of Claims has observed, "[i]t is hoped that *every* Government purchase 'benefits the public' in some way." *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 559 n.8 (Ct. Cl. 1978) (emphasis in original). Indeed, given the purposes of the CDA – to standardize government contracting and to bring fairness to the government contracting process – it is hard to see why it would matter whether the goods, services, or property repair contracted for by the government principally benefit "park area visitors" rather than the government itself. The court of appeals was not at liberty to add

limiting language to a statute that Congress intended to be broad and comprehensive. See *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l., Inc.*, 122 S. Ct. 593, 598 (2001); *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945).[2]

4. As the court of appeals acknowledged (App., *infra*, 28a-29a), the Department of the Interior's own Board of Contract Appeals has long held that NPS concessions contracts are subject to the CDA and has specifically found that the portion of 36 C.F.R. § 51.3 exempting such contracts from the CDA is invalid. See *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001); *Nat'l Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994); *R & R Enters.*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790, at *32 (Mar. 24, 1989), aff'd on reconsideration, 89-3 BCA ¶ 22,043, 1989 WL 75890 (July 6, 1989). As the Board stated in *Watch Hill*,

> Congress could not have expressed itself more clearly to the effect that *all* contract claims based on a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures, beginning with the decision of the contracting officer.

2001 WL 170911, at *6 (emphasis added).

Rather than follow these decisions by the expert IBCA (see 41 U.S.C. §§ 607(d), 609(a)(1)), the court of appeals relied on *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366 (1993). See App., *infra*, 28a. But *YRT* held only that another set of rules, the Federal Acquisition Regulations ("FAR"), do not apply to concessions contracts. In addressing the question of whether the FAR applied to concessions contracts, *YRT* analogized to the applicability of yet another federal contracting statute – the Competition in Contracting Act ("CICA"), Pub. L. 98-369, 98 Stat. 1175 (codified at 31 U.S.C. §§ 3551-3556, 41 U.S.C. § 253) – which the *YRT* court opined did not apply to concessions contracts. *See YRT*, 28 Fed. Cl. at 392. In making this CICA-applicability analogy, however, the *YRT* decision offered no opinion about the applicability of the CDA.

Even if *YRT* were relevant to this case, that decision was expressly based on the views of the Comptroller General, who administers the CICA. See 28 Fed. Cl. at 392 (citing *Stephen Sloan Marine Corp.*, B-234219, 89-1 C.P.D. ¶ 435 (May 9, 1989)). But the Comptroller General since has clarified that *YRT* was based on a misunderstanding of his CICA jurisdiction. Thus, in adopting *YRT's* "permits" analogy, the D.C. Circuit ignored the Comptroller General's repeatedly-expressed position that concessions contracts are *not* like "permits," but instead involve services for the agency and hence are subject to CICA.[3]

---

[2] Nor was the court of appeals correct that coverage under the CDA requires the government to "commit[] to pay out government funds." App., *infra*, 28a (internal citation and quotation marks omitted). CDA coverage explicitly does not depend on the expenditure of appropriated funds. See 41 U.S.C. § 602(a). Thus, the CDA is different from most other procurement-related statutes, which *are* limited to appropriated-fund activities and therefore do not apply to NPS concessions contracts. (For example, the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*) applies only to certain "contract[s] in excess of $2,000" (*id.* § 276a(a)), and the Service Contract Act (41 U.S.C. § 351 *et seq.*) applies to contracts "in excess of $2,500" (*id.* § 351(a)); neither statute applies to NPS concessions contracts.)

[3] See *Total Procurement Services, Inc.*, B-255934.3, 1994 WL 450445 (Aug. 16, 1994) ("Where a license agreement or conces-

Underscoring the D.C. Circuit's error, the Comptroller General just last month explained the distinction between NPS "permits" and NPS "contracts," holding that NPS concessions contracts are "procurements" within its CICA jurisdiction:

> [W]here the award of a concession contract included the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself, we found that the solicitation involved a procurement of services. * * * On the other hand, * * * where the agency's issuance of concession permits merely allowed entry by visitors into a national park, and did not also include the provision of services to the government, we did not exercise jurisdiction.

Starfleet Marine Transp., Inc., B-290181, 2002 U.S. Comp. Gen. LEXIS 90, at *14-15 (July 5, 2002).

Indeed, the decision in *Starfleet Marine* considered and rejected the D.C. Circuit's reasoning in this very case:

> In reaching its conclusion and holding, the [D.C. Circuit] seems to have assumed that all concession contracts result in no more than "incidental benefits" to the government. In its brief discussion of this

---

sion contract confers a benefit upon the government and furthers the function of an agency, we view the agreement or contract as one involving the procurement of property or services and therefore subject to our bid protest jurisdiction."); *West Coast Copy, Inc.*; B-254044.2, 1993 WL 476970, at *4 (Nov. 16, 1993) ("Where the government invites private vendors to compete for a business opportunity, the performance of which will produce a benefit to the government (such as a reduction in the government agency's own workload or some other support of the agency's mission), all elements necessary to invoke our [CICA] jurisdiction are present.").

> issue, the court also appears to have assumed that the primary purpose of a contractual transaction makes it exclusively a sale or a procurement. In our opinion, the court's view that a concession contract cannot also involve the procurement of property or services within the meaning of CICA does not take into account the specific facts of each situation.

Id. at *16-17.[4]

5. Finally, we note that when it was to the government's advantage to do so, the Department of Justice itself argued that the CDA applies to concessions contracts. See *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996); App. *infra*, 95a-100a. The concessions contract at issue in *Pound* was to operate a marina on land owned by the Army Corps of Engineers. See *id.* at 98a. The government argued that the CDA applied to that concessions contract under, among other subsections, 41 U.S.C. § 602(a)(3), which covers government contracts for the repair or maintenance of real property. See Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment Upon Count I Of The Complaint And Motion For Summary Judgment Upon Counts II And III And Defendant's Counterclaim, at 10-11 (Apr. 28, 1995), re-

---

[4] Although the Comptroller General's reasoning is persuasive evidence that the CDA applies to NPS concessions contracts, we agree with the NPS that the CICA in fact does not apply to such contracts. The CICA applies to "contract[s] for the procurement of property or services" (31 U.S.C. § 3551(1)(A)), which, as the Comptroller General notes, are also contracts within the scope of the CDA. See *Starfleet Marine*, 2002 U.S. Comp. Gen. LEXIS, at *16 n.10. Like the CDA, the jurisdiction of the CICA "does not turn on whether appropriated funds are involved." *Id.* at *12. But the CICA, unlike the CDA, on its face "does not encompass procurement procedures which are otherwise expressly authorized by other statutes" (*YRT*, 28 Fed. Cl. at 392-393 (citing 41 U.S.C. § 253(a)(1))), such as the 1998 Act.

printed at App., *infra*, 100a. The government contended that the CDA was applicable because the concessioner constructed structures on and maintained the marina, in much the same way that NPS concessioners construct structures on and maintain NPS concessions.[5]

In sum, both the D.C. Circuit's decision limiting coverage of the CDA to contracts that "procure services or goods *for the government*" (App., *infra*, 27a (emphasis added)) and its determination that NPS concessions contracts fail to meet that test are contrary to the plain language and purpose of the statute and are inconsistent with the views of expert agencies. The NPS plainly procures both "services" and the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)) in its concessions contracts.

B. The Decision Below Creates A Conflict In The Circuits On Whether The Contract Disputes Act Applies To Concessions Contracts.

The court of appeals' construction of the Contract Disputes Act cannot be squared with the decision of the Federal Circuit in *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997), and of the Federal Circuit's precursor – the Court of Claims – in *Yosemite Park & Curry Co.*, 582 F.2d 552.

Total Medical Management involved agreements between the military and a private health care company to provide medical services to military dependants at an army hospital. As here, the government argued that the agreements were not subject to the CDA "because they are not procurement contracts for the benefit of the government," but instead "are solely for the benefit of the military dependents who receive the medical care." See *Total Med. Mgmt.*, 104 F.3d at 1320. The Federal Circuit rejected that argument, explaining that, "since it is clear that the government has legal obligations to military dependents and benefits by obtaining said dependents' care at a reduced cost," the agreements were procurement contracts subject to the CDA. *Ibid.*

[5] The Court of Federal Claims in *Pound* did not address substantively the applicability of the CDA, noting instead that the parties *agreed* that the Act applied. See *Pound* v. *United States*, No. 94-496C, slip op. at 1 n.1, 10 n.2 (Fed. Cl. Aug. 30, 1996).

In precisely the same way, the NPS has statutorily defined legal obligations to provide the visiting public with food, lodging, and other services in the national parks, and it has elected to discharge those duties by procuring them from concessioners rather than by furnishing them directly. See 16 U.S.C. §§ 1, 5951, 5952. See generally pages 4-6, *supra*. The decision below – that the CDA does not apply to NPS concessions contracts because their function is to "authorize third parties to provide services" rather than "to procure services or goods for the government" (App., *infra*, 27a) – is totally at odds with the Federal Circuit's view of the CDA in *Total Medical Management*.

Indeed, the NPS itself convinced the Court of Claims that concessions contracts fall within the reach of certain government procurement statutes such as the CDA. In *Yosemite Park & Curry Co.*, the concessioner argued that NPS concessions contracts were exempt from such statutes. The NPS disputed that assertion, and the court agreed with the agency. As the court explained, NPS concessions contracts will be covered by procurement statutes – assuming other statutory requirements are met – because the NPS cannot "avoid normal, legally mandated, procurement procedures" by "characteriz[ing] the procurement of * * * services for the public as the granting of a 'concession' to a specific contractor." *Yosemite Park & Curry Co.*, 582 F.2d at 558. As the court explained,

> [P]laintiff's attempted argument that a "concession" purchase is somehow different from a normal purchase because a concession contract "benefits the

> public" should * * * be accorded little weight. It is hoped that *every* Government purchase "benefits the public" in some way.

Id. at 559 n.8 (emphasis in original).[6]

Despite the fact that the NPHA expressly relied on *Total Medical Management*, *Yosemite Park & Curry Co.*, and *Oroville-Tonasket* in its briefs (see Br. Pls.-Appellants at 52, 54; Reply Br. Pls.-Appellants at 28), the court below never mentioned, much less attempted to reconcile, these conflicting decisions. Certiorari is plainly warranted to resolve this significant split of authority.

C. The Issue Presented Here Is Of Substantial Practical Importance.

This Court's review is essential because of the practical importance of the issue presented. The government contracts to purchase more than $220 billion in goods and services each year. See *Encourage Contracting Out of Federal Services: A Legislative Hearing on H.R. 3832, The Services Acquisition Reform Act of 2002 (SARA), Before the Subcomm. on Technology and Procurement Policy, House Comm. on Gov't Reform*, 107th Cong. (Mar. 7, 2002) (statement of Angela B. Styles, Administrator for Federal Procurement Policy, at 1). This case has implications not only for NPS

---

[6] The Court of Federal Claims – the court to which Congress has conferred jurisdiction over CDA claims (see page 4, *supra*) – has also held that the CDA applies to concessions contracts indistinguishable from NPS concession contracts. See, *e.g.*, *Oroville-Tonasket*, 33 Fed. Cl. at 22 (concluding that contract to manage a dam providing irrigation involved both "procurement of services" and procurement of "construction, alteration, repair or maintenance of real property" for purposes of CDA because contractor operated and maintained federally-owned facility, thus fulfilling responsibilities assigned by Congress to Secretary of Interior).

concessions contracts, but also for a significant portion of *all* government procurement contracts.

As Congress explained in enacting the CDA,

> How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors – or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. REP. NO. 95-1118, at 4. "Prior to the CDA, the 'system' for resolving federal contract disputes can best be described as a mess." C. Kipps, T. Kindness, & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System* ("*Solid Foundations*"), 28 PUB. CONT. L.J. 585, 585 (1999). Thus, the CDA was passed with the express purposes of standardizing government contracting systems and providing contractors with an independent method to adjudicate disputes, thus freeing them from "[t]he predilections of different agencies." S. REP. NO. 95-1118, at 3.

The CDA has been a great success, hailed as "a remarkable milestone in the field of government contracts for several reasons, including the fact that it lifted the disputes process out of the discretionary realm of agency clauses and placed the process squarely within a fixed statutory framework." *Solid Foundations*, *supra*, at 591. The CDA has "worked exceedingly well" for the past two decades. *Id.* at 585. In the sole previous instance when the courts significantly limited the scope of the CDA – by proclaiming restrictive rules for "certifying" a claim – Congress eventually stepped in to overrule that cramped interpretation. See *id.* at 592-595. Rather than rely on Congress, in this instance the Court should grant certiorari to resolve the confusion in the circuits over the coverage of the CDA and to correct the

lower court's unduly narrow reading of the statute. Cf. *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (Court granted certiorari "because of the importance of [questions about the coverage of government contract disputes clause] in the administration of government contracts").

The decision below – exempting government contracts that benefit third parties from the scope of the CDA – undermines the CDA's goals of consistency and external accountability and threatens a return to the messy system of yesteryear, when "contractors were caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." *Solid Foundations*, *supra*, at 587. As *Total Medical Management*, *Oroville-Tonasket*, and *Pound* demonstrate, the NPS is far from unique in relying on concessions contracts to fulfill significant portions of its statutory mission.[7] The decision below could affect all such concessions contracts. Even *uncertainty* about whether concessions contracts include the protections of the CDA is, from the perspective of a contractor, almost as bad as not having such protections at all. Yet the D.C. Circuit's amorphous "benefits-third-parties" exception makes it difficult or impossible for agencies and contractors alike to determine whether a specific contract is covered by the CDA, or if instead its benefits inure to third parties to such an extent that the CDA does not apply.

The decision below also creates an incentive for agencies that would rather not expose their contracting decisions to a

[7] See also, *e.g.*, *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 ASBCA LEXIS 40 (Feb. 28, 2001); *Home Entm't, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 ASBCA LEXIS 126 (Aug. 23, 1999); *Senor Tenedor, S.A. de C.V.*, ASBCA Nos. 48502 *et al.*, 97-2 BCA ¶ 29,192, 1997 ASBCA LEXIS 150 (Aug. 15, 1997).

neutral arbiter to design their contracting programs in such a way that the CDA would not apply. Because it could be argued that any government service contract benefits the persons served – even if fulfilling a statutory mandate – the unifying protections and procedures afforded to a large percentage of government contracts could unravel quickly.

Finally, the decision below has significant implications for the well-being of the Nation's national parks. Under the regulation at issue, NPS concessioners are denied neutral arbiters in any dispute they may have with the NPS, which "influences how, whether, and at what prices they compete for Government contract business." S. REP. NO. 95-1118, at 4. The lack of protection afforded by the CDA will damage the public-private partnership that long has served visitors to the national parks and fulfilled the statutory mandate of 16 U.S.C. § 1 (see pages 4-5, *supra*), in ways that may significantly undermine the public's ability to enjoy these national treasures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

AUGUST 2002

APPENDIX

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

AMFAC RESORTS, L.L.C., *Appellant*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Appellees*.

Nos. 01-5223, 01-5226, 01-5229 and 01-5233.

Argued Nov. 6, 2001.

Decided March 1, 2002.

Rehearing and Rehearing En Banc Denied May 8, 2002.

Before: RANDOLPH and GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

These are four consolidated cases on appeal from the judgment of the district court sustaining regulations of the National Park Service governing concession contracts in the National Park System. Many of the issues are tied to the history of the National Park System and the functions concessioners perform in the operation of the parks.

The history begins with the discovery of "Old Faithful" and the other natural wonders of what is now Yellowstone National Park. In 1872, Congress withdrew the land at the headwaters of the Yellowstone River from "settlement, occupancy, or sale," thus creating the first national park in the United States. Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32. *See also* AUBREY L. HAINES, YELLOWSTONE NATIONAL PARK: ITS EXPLORATION AND ESTABLISHMENT (1974). Not everyone had been enthusiastic about the plan to create Yel-

lowstone National Park. A local newspaper editorial worried that "the effect of this measure will be to keep the country a wilderness, and shut out, for many years, the travel that would seek that curious region if good roads were opened through it and hotels built therein." HAINES, *supra*, at 127 (quoting the HELENA DAILY HERALD of Mar. 1, 1872). In the final legislation, Congress responded by authorizing the Secretary of the Interior to lease portions of the park for "the erection of buildings for the accommodation of visitors." 17 Stat. 33.

As the United States withdrew more areas from the public domain, it continued to favor the interests of park visitors. In creating the National Park Service in 1916, Congress authorized the Interior Secretary to "grant privileges, leases, and permits for the use of land for the accommodation of visitors" to each of the "various parks, monuments, or other reservations" under the Secretary's authority. An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916). In the view of the first director of the Park Service, Stephen Mather: "Scenery is a hollow enjoyment to a tourist who sets out in the morning after an indigestible breakfast and a fitful sleep in an impossible bed." Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L. J. 3, 3 (1992).

During its first thirty years, the Park Service followed internal regulations and policies governing concessioners and their obligations to park visitors and to the national park lands. The government also offered financial inducements to private contractors to convince them to provide and operate facilities in what were often remote locations. *See Park Concession Policy: Hearings Before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs*, 88th Cong. 5-8 (1964) [hereinafter *Park Concession Policy Hearings*] (letter from John A. Carver, Jr., Assistant Secretary of the Interior).

For our purposes the most significant of these incentives was a preferential right of renewal, which "contemplated that every existing contract covering public operations [in the national parks] will be renewed at the expiration thereof, provided, of course, that full and satisfactory service to the public had been given thereunder." Memorandum for the Acting Under Secretary, U.S. Department of the Interior (Aug. 10, 1940). When the Interior Department sought to change its policies and withdraw some of these financial incentives in the late 1940s, the concessioners and some in Congress balked. *See* H.R. RES. 66, 81st Cong. (1950), passed by the Comm. on Public Lands and included in H.R. REP. NO. 81-3133, at 5-6 (1950). In response, the Secretary announced new guidelines for concession contracts and preserved many of the existing financial incentives for concessioners, including the preferential right of renewal. *Id.* at 4-5. The House Committee on Public Lands passed a resolution endorsing these new guidelines, although the resolution of course had no legal effect. *INS* v. *Chadha*, 462 U.S. 919 (1983).

By the 1960s, other House committees started expressing doubt about the soundness of the Interior Department's contracting policies, particularly the financial incentives it was giving concessioners. See HOUSE COMM. ON GOVERNMENT OPERATIONS, SURVEY OF SELECTED ACTIVITIES, H.R. REP. NO. 88-306, pt. 3, at 4-12 (1963) ("The committee's inquiry disclosed considerable weakness in the National Park Service's operations in several matters involving concessioners in the national parks."). When Congress considered the 1964 appropriations bill for the Department of the Interior, the House Committee on Appropriations recommended that "competitive bidding should be required for concession contracts, in lieu of the current practice of granting preferential opportunities to existing concessioners to negotiate new contracts." DEPARTMENT OF THE INTERIOR AND RELATED

AGENCIES APPROPRIATION BILL, H.R. REP. NO. 88-177, at 10 (1963).

Concerned that "certain other committees that do not have jurisdiction" had "attempted to get into the problem of concessions," the House Committee on Interior and Insular Affairs produced a bill to "put into statutory form" the long-standing concessions policies of the Park Service, including the preferential right of renewal. H.R. REP. NO. 89-591, at 1 (1965); *Park Concession Policy Hearings* at 19. In 1965, these concession policies were enacted into law. *See* 111 CONG. REC. 23,632-48 (1965). Part of the legislation provided that the "Secretary [of the Interior] shall ... giv[e] preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations ... to the satisfaction of the Secretary." National Park Service Concessions Policy Act, Pub. L. No. 89-249, § 5, 79 Stat. 969, 970 (1965), *repealed by* National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, § 415(a), 112 Stat. 3497, 3515. The preference gave "incumbent concessioners, upon renewal, the right to meet any better offer received" by the Park Service. U.S. DEP'T OF THE INTERIOR, REPORT OF THE TASK FORCE ON NATIONAL PARK SERVICE CONCESSIONS 10 (1990).

The 1965 Act governed all concession contracts entered into by the Park Service. Concessioners paid the government a franchise fee, typically less than five percent of gross revenues, for the privilege of operating on federal land. If they used government-owned facilities they paid an additional fee.

In 1998, after several aborted attempts, Congress repealed the preferential right of renewal and enacted other rules governing concession contracts. National Parks Omnibus Management Act of 1998, 16 U.S.C. §§ 5951-5966.

Plaintiffs are three companies who have current concessions contracts with the Park Service and an association of concessioners. They brought four separate actions challenging the Park Service regulations, issued in 2000, to implement the 1998 Act. 65 Fed. Reg. 20,630 (Apr. 17, 2000) (to be codified at 36 C.F.R. pt. 51). The district court consolidated the four lawsuits, and granted summary judgment to the government on all of the claims save one (which has not been appealed to this court). *Amfac Resorts* v. *United States Dep't of the Interior*, 142 F. Supp. 2d 54 (2001).

I.

The first issue centers on the 1998 Act's repeal of the statutory preferential right of renewal in § 5 of the 1965 Act. The 1998 Act provided that, except for small contracts and outfitter and guide services, "the Secretary shall not grant a concessioner a preferential right to renew a concessions contract." 16 U.S.C. § 5952(7). A savings clause in the 1998 Act, § 415(a), states: "repeal of [the 1965 Act] shall not affect the validity of any concessions contract or permit entered into under such Act, but the provisions of this title shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit." Pub. L. No. 105-391, § 415(a), 112 Stat. 3497, 3515 (1998).

The Park Service interpreted the repealing and the savings clauses in the following narrative regulation:

> **§ 51.102 What is the effect of the 1998 Act's repeal of the 1965 Act's preference in renewal?**
>
> (a) Section 5 of the 1965 Act required the Secretary to give existing satisfactory concessioners a preference in the renewal (termed a "renewal preference" in the rest of this section) of its concession contract or permit. Section 415 of the 1998 Act repealed this statutory renewal preference as of November 13, 1998. It is the final decision of the Director, subject to the right of appeal set forth in paragraph (b) of this section, that holders of 1965 Act concession

contracts are not entitled to be given a renewal preference with respect to such contracts (although they may otherwise qualify for a right of preference regarding such contracts under Sections 403(7) and (8) of the 1998 Act as implemented in this part). However, if a concessioner holds an existing 1965 Act concession contract and the contract makes express reference to a renewal preference, the concessioner may appeal to the Director for recognition of a renewal preference.

(b) Such appeal must be in writing and be received by the Director no later than thirty days after the issuance of a prospectus for a concession contract under this part for which the concessioner asserts a renewal preference. The Director must make a decision on the appeal prior to the proposal submission date specified in the prospectus. Where applicable, the Director will give notice of this appeal to all potential offerors that requested a prospectus. The Director may delegate consideration of such appeals only to a Deputy or Associate Director. The deciding official must prepare a written decision on the appeal, taking into account the content of the appeal and other available information.

(c) If the appeal results in a determination by the Director that the 1965 Act concession contract in question makes express reference to a renewal preference under section 5 of the 1965 Act, the 1998 Act's repeal of section 5 of the 1965 Act was inconsistent with the terms and conditions of the concession contract, and that the holder of the concession contract in these circumstances is entitled to a renewal preference by operation of law, the Director will permit the concessioner to exercise a renewal preference for the contract subject to and in accordance with the otherwise applicable right of prefer-

ence terms and conditions of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus. The Director, similarly, will permit any holder of a 1965 Act concession contract that a court of competent jurisdiction determines in a final order is entitled to a renewal preference, for any reason, to exercise a right of preference in accordance with the otherwise applicable requirements of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus.

36 C.F.R. § 51.102 (2001).

The Park Service thus will not recognize a preferential right of renewal for concessioners whose pre-1998 contracts are expiring, unless the contract expressly so provides. *See* 65 Fed. Reg. at 20,631-33. In the language of the savings clause of § 415(a), without such contractual "terms and conditions" it would not be "inconsistent" — as the Park Service sees it — to refuse to allow a preferential right of renewal.

A typical concession contract runs for 15 or 20 years. REPORT OF THE TASK FORCE ON NATIONAL PARK SERVICE CONCESSIONS, *supra*, at 5. One of the plaintiffs, Amfac Resorts, L.L.C., had a 30-year contract for the Grand Canyon. A right of renewal for pre-1998 contracts is therefore a matter of great interest to those holding these contracts. The concessioners say that the renewal provision of the 1965 Act represented an "entrenched policy"; that the policy was incorporated by law as an unwritten term in every concession contract signed between 1965 and 1998; and that the Park Service regulation violates § 415 of the 1998 Act (the savings clause) because it allows a preferential right of renewal only if contracts before the 1998 Act expressly so state.

A.

The concessioners' argument in favor of an "implied" right of renewal initially rests on the "*Christian* doctrine," named after *G.L. Christian & Assocs.*, 312 F.2d 418, 424 (Ct. Cl. 1963). As they explain it, the doctrine requires "that longstanding and deeply-ingrained agency policies, such as the [Park Service's] entrenched policy of granting concessioners renewal rights in exchange for concessioner investments, form a mandatory part of all government contracts." Brief for Appellants at 21.

The Federal Circuit has, on occasion, concluded that certain statutory or regulatory provisions may become part of a government contract even though the contract does not contain language to that effect. *See S.J. Amoroso Constr. Co.* v. *United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993); *General Engineering & Machine Works* v. *O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993).

Our court has never adopted the Federal Circuit's *Christian* doctrine. Even if we did so, it would boot the concessioners nothing. In describing the doctrine, they have omitted a crucial element. The Federal Circuit does not hold that significant or important federal policies "form part of government contracts even where absent from those contracts' explicit text." Brief for Appellants at 22. If that were the law, Congressional power to make adjustments in legislation would be greatly constricted. Statutory provisions would live on as part of long-term contracts well after their repeal or modification. This is why, as the Supreme Court put it in *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937), there is a "presumption" that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." To this the Court added in *Nat'l R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) [hereinafter *Atchison*]: "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." It is true, as the concessioners point out, that the holding of *Atchison* was that a statute did not itself create a contract. Reply Brief for Appellants at 12. But it is not true that the case is therefore "irrelevant." *Id.* The Court's reasoning applies equally to claims, such as the concessioners', that a statute (here the 1965 Act) created a contractual obligation in all contracts executed before its repeal. *See General Motors Corp.* v. *Romein*, 503 U.S. 181, 190 (1992).

One element of the *Christian* doctrine, the element missing from the concessioners' statement of the law, saves it from contradicting this line of Supreme Court authority. According to the Federal Circuit, it is not enough that the legislative or regulatory provision is important or significant (assuming one could make such rankings). To constitute a contractual obligation even though not written in the contract, the provision must be a mandatory contract clause, a clause the legislation — or as in *Christian*, 312 F.2d at 424, the regulation — requires to be included in contracts. Thus, "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law." *S.J. Amoroso Constr. Co.* v. *United States*, 12 F.3d at 1075. And the *Christian* doctrine "applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy." *General Engineering & Machine Works* v. *O'Keefe*, 991 F.2d at 779.

The renewal provision contained in § 5 of the 1965 Act was by no stretch a mandatory contract term. The Secretary's contracting authority was derived from a different part of the 1965 Act — § 3, which authorized the Secretary to "include in contracts" such "terms and conditions as, in his judgment, are required to assure the concessioner of adequate

protection against loss of investment ... resulting from discretionary acts, policies, or decisions of the Secretary occurring after the contract has become effective....." § 3, 79 Stat. 969. Section 5 of the 1965 Act was of another sort. It stated that the Secretary "shall ... giv[e] preference in the renewal of contracts or permits...." § 5, 79 Stat. 970. Rather than leaving the matter to individual negotiations, § 5 required the Secretary to grant a right of renewal to all concessioners, regardless of the terms of their individual concession contracts. The provision thus constituted "legislation which merely declares a state policy, and directs a subordinate body to carry it into effect." *Dodge* v. *Bd. of Educ.*, 302 U.S. at 78. We agree with the district court that if § 5 meant that the Secretary had to insert a preferential right of renewal clause in all concession contracts, one would have expected a direction, or at least an authorization, to this effect. 142 F. Supp. 2d at 72. There is none.

It is possible that some parties nevertheless insisted on having a right of renewal written into their contracts and that the Secretary yielded. Possible, but not likely. The concessioners have identified no such contract and the Park Service is aware of none. 65 Fed. Reg. at 20,664. The Service's standard-form concession contract, in effect from 1965 to 1998, contained no right-of-renewal clause. *See* 65 Fed. Reg. at 20,632. The regulation under the 1998 Act nevertheless allows for the possibility and, in compliance with the saving clause, states that if a concession contract contains an express right of renewal the Secretary will honor it. 36 C.F.R. § 51.102(c) (2000).

B.

Apart from the *Christian* doctrine, each of the concessioners maintains that the Park Service's regulation is "facially invalid because [it denies] altogether the *possibility* of implied contractual rights in individual cases" and prevents "any concessioner in a future proceeding from offering specific evidence of a bargained-for and mutually-agreed upon contractual renewal right. If even one concessioner has such evidence, the regulations denying those rights across-the-board are unlawful." Brief for Appellants at 26, 27. In other words, although the regulation is valid as applied to dozens of concession contracts, it is invalid because of the possibility that one concessioner might have an implied — that is, an unwritten — preferential right of renewal. The argument, aimed at the validity of the regulation on its face, does not accurately state the law.

In *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the Supreme Court stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Justice Stevens believes that only the second sentence of the *Salerno* excerpt states the governing principle for facial challenges. He and Justice Scalia have debated whether the first sentence from *Salerno* — what has become known as the "no-set-of-circumstances" test — is instead controlling. *See City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (plurality opinion by Stevens, J., joined by Justices Souter and Ginsburg); *id.* at 74-83 (Scalia, J., dissenting). *See also Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., joined by Justices Scalia and Thomas, dissenting). For our part, we have invoked *Salerno's* no-set-of-circumstances test to reject facial constitutional challenges.

See, e.g., James Madison Ltd., by Hecht v. *Ludwig*, 82 F.3d 1085, 1101 (D.C.Cir.1996); *Chemical Waste Mgmt., Inc.* v. *EPA*, 56 F.3d 1434, 1437 (D.C.Cir.1995); *Steffan* v. *Perry*, 41 F.3d 677, 693 (D.C.Cir.1994) (en banc).

The facial attack on § 51.102 is not, of course, on the basis that the regulation is unconstitutional. The claim is that § 51.102 conflicts with § 415 of the 1998 Act. In *National Mining Ass'n* v. *Army Corps of Engineers*, 145 F.3d 1399, 1407 (D.C.Cir.1998), we declined to adopt the *Salerno* test in a comparable case, stating that the "Supreme Court has never adopted a 'no set of circumstances' test to assess the validity of a regulation challenged as facially incompatible with governing statutory law."

Our examination of Supreme Court precedent in *National Mining* apparently overlooked *Reno* v. *Flores*, 507 U.S. 292 (1993). There a class of alien juveniles, arrested on suspicion of being deportable and then detained pending deportation hearings, claimed that a regulation preventing their release except to close relatives violated the Due Process Clause and conflicted with the underlying statute. The Court, speaking through Justice Scalia, described the case as involving only a facial challenge to the regulation and then held as follows: "To prevail in such a facial challenge, respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid.' *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That is true as to both the constitutional challenges, see *Schall* v. *Martin*, 467 U.S. 253, 268 (1984), and the statutory challenge, see [*INS* v. *National Center for Immigrants' Rights*, 502 U.S. 183, 188 (1991) [hereinafter NCIR]]." 507 U.S. at 301. *See Public Lands Council* v. *Babbitt*, 167 F.3d 1287, 1301 (10th Cir.1999) (applying the *Reno* v. *Flores* formulation to a statutory challenge to a regulation). *Cf. Pharmaceutical Research & Mfrs.* v. *Concannon*, 249 F.3d 66, 77 (1st Cir.2001) (applying *Salerno* in a preemption case). *See also* Marc E. Isserles, *Overcoming*

Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 AM. U. L. REV. 359, 405 (1998).

When an intervening Supreme Court decision alters the law of the circuit, a panel of our court must follow the Court's decision in all later cases. *See, e.g., McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C.Cir.1995); *National Treasury Employees Union* v. *FLRA*, 30 F.3d 1510, 1516 (D.C.Cir.1994). But here the Supreme Court decision was not intervening; it was rendered before *National Mining*. Whether despite *Reno* v. *Flores*, *National Mining* therefore must stand as circuit law unless and until the full court overrules it is a question unnecessary for us to answer. *See LaShawn A.* v. *Barry*, 78 F.3d 1389, 1395 (D.C.Cir.1996) (en banc). *National Mining* dealt only with the no-set-of-circumstances formulation of *Salerno*. It did not mention NCIR, the opinion cited in *Reno* v. *Flores* for the proposition that *Salerno* applied to statutory challenges. Justice Stevens, writing for the Court in NCIR, held: "That the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without statutory authority." 502 U.S. at 188. *NCIR*, without citing *Salerno*, echoed in a non-constitutional setting the sentence in *Salerno* following the no-set-of-circumstances test — "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," 481 U.S. at 745. *See Janklow* v. *Planned Parenthood*, 517 U.S. 1174 (1996) (memorandum of Stevens, J., on denial of certiorari).

Either formulation — the no-set-of-circumstances test adopted from *Salerno* in *Reno* v. *Flores*, or the less strict NCIR standard — may pose potential problems for judicial review of agency regulations, especially in this circuit. Lacking a rulemaking record containing evidence relating to the rule's application to a particular entity, petitioners ordinarily mount only facial attacks, often on the ground that the agency's product conflicts with the statute. In such cases, the

consequence of upholding the regulation because it is not invalid in all its applications (*Reno* v. *Flores*), or because it is invalid in only some of its applications (*NCIR*), may be that petitioners would have to make their challenge in another circuit and in another setting, in defense of an enforcement action for instance. Some of the statutes governing jurisdiction prescribe a specific time period for judicial review of regulations, restrict venue to our circuit, and may prohibit review outside the time period, except in limited circumstances. *See, e.g.*, *Clean Air Act*, 42 U.S.C. § 7607(b); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(a); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978); *United States* v. *Ethyl Corp.*, 761 F.2d 1153 (5th Cir.1985); Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279, 285-90. Although one court has held that the Clean Air Act, 42 U.S.C. § 7607(b), deprived it of jurisdiction to review EPA regulations when they are applied, *see Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509, 513 (4th Cir.1981), we have ruled that preclusion must be explicit for review to be barred in an enforcement action, *see Indep. Cmty. Bankers of Am.* v. *Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C.Cir.1999), and that even express preclusion may not operate when the issue would have been unripe during the period of statutory review. *See Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C.Cir.1998). Perhaps the congressional intent reflected in judicial review provisions such as § 7607(b) of the Clean Air Act may also demand adjustments in the *Reno* v. *Flores* or *NCIR* test for reviewing facial attacks on regulations, assuming the tests are not constitutionally compelled. *See City of Chicago* v. *Morales*, 527 U.S. at 77 (Scalia, J., dissenting).

Whatever the outcome in such cases, the situation here is not comparable. Our circuit does not have exclusive jurisdiction over Park Service regulations, and judicial review is not

confined to a particular time period. Nothing would preclude a concessioner from bringing an action for a declaratory judgment that the regulation, as applied to the concessioner, deprives it of a contractual right in violation of the savings clause. In fact, one of the consolidated actions in the district court was such a suit. Amfac's complaint alleged that its 1969 contract for the Grand Canyon was about to expire, that the contract contained an implied preferential right of renewal arising "from the circumstances of the formation of the 1969 contract," that the Park Service's regulation denied the existence of such an implied term, and that the regulation as applied to Amfac therefore violated § 415 of the 1998 Act. Although § 51.102 may be valid on its face, this would not necessarily doom Amfac's as-applied challenge.

With this in mind, we return to the concessioners' assertion that if "even one concessioner has [evidence showing an implied right of renewal], the regulations denying those rights across-the-board are unlawful." Brief for Appellants at 27. We do not need to choose between *Reno* v. *Flores* or *NCIR* to dispose of that contention. Not even First Amendment overbreadth analysis — which embodies a far more difficult standard for laws to satisfy than the one the Court formulated in *Salerno* — would render a law facially invalid because of the prospect of a single invalid application. An overbreadth attack will succeed only if the legislation is substantially overbroad — that is, only if the law "reaches a substantial number of impermissible applications." *New York* v. *Ferber*, 458 U.S. 747, 771 (1982). That there might be one invalid application is therefore far from enough to make the regulation unlawful under any of the standards we have mentioned.

Perhaps recognizing as much, the concessioners assert that "*some* contracts might *as a factual matter* include the [renewal] right as a bargained-for term," a "possibility" (despite obstacles posed by the parol evidence rule and perhaps statutes of fraud) they think is enough to render the regula-

tion unlawful. Brief for Appellants at 29. But far more is demanded before a regulation may be declared facially invalid. Under *Reno* v. *Flores*, § 51.102 must of course be sustained on its face because there are circumstances in which applying the regulation would not be inconsistent with § 415 of the 1998 Act. The regulation's requirement of an express contract term, for instance, properly eliminates claims of an implied renewal right based on the *Christian* doctrine alone. Even under the more relaxed standard of *NCIR*, it is not enough that "*some* contracts might *as a factual matter*" contain an implied renewal right. To repeat, that "the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without statutory authority." *NCIR*, 502 U.S. at 188. We therefore reject the concessioners' facial attack on § 51.102.

In reaching this result we have followed a course different than that of the district court. We should explain why. The district court thought the "lawfulness of the defendants' regulations turns on whether the plaintiffs each have a contractual right to preference renewal." 142 F. Supp. 2d at 71. With this we agree. We also agree — as our discussion of the *Christian* doctrine indicates — with the district court's conclusion that the 1965 Act did not itself confer a contractual renewal right on the concessioners. *Id.* at 72. As to the concessioners' allegations that they had an implied-in-fact contract embodying their right of renewal, the court rejected these claims on the basis that "the administrative record provides no indication that the parties had the *mutual* understanding that the contract contained the renewal terms." *Id.* at 73. (The court must have had in mind all existing concession contracts, not just one.) The court added that the administrative record "is wholly devoid of information suggesting that the [Park Service] *intended* the renewal term to be part of the contract." *Id.* But that is entirely understandable in light of the fact that the Park Service's proposed rule dealing with rights of renewal did not contain the restriction requiring the renewal right to be spelled out as an express term. *See* Concessions Contracts, 64 Fed. Reg. 35,516, at 35,535 (proposed June 30, 1999). The concessioners thus had no reason to submit evidence of implied renewal rights in each of their contracts, assuming this sort of evidence would have been allowed in the rulemaking proceeding or could have been mustered. Moreover, the Park Service never indicated that its final regulation rested on the district court's rationale. *See SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). After denying that the right could be inferred from the 1965 Act, the Park Service explained that an implied renewal right "is inconsistent with the express terms of almost all current NPS concession contracts," 65 Fed. Reg. at 20,633. Most contracts, according to the Park Service, contained a provision along these lines:

> This Contract [or permit] and the administration of it by the Secretary shall be subject to the laws of Congress governing the Area and rules, regulations and policies whether now in force or hereafter enacted or promulgated.

Id. But that begs the question the concessioners posed here (and in the rulemaking, *see* Comments of the National Park Hospitality Ass'n at 23 (Oct. 14, 1999)). The savings clause of the 1998 Act is one of the "laws of Congress" to which this contractual provision refers. If a concessioner has an implied right of renewal in a pre-1998 contract, the savings clause preserves it. The Park Service does not deny the possibility of an implied contractual provision — that is, an unwritten one — in government contracts. See Willard L. Boyd, III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605 (1991); Michael C. Walch, Note, *Dealing with a Not-so-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367 (1985). The district court, quoting *Hercules, Inc.* v. *United States*, 516

U.S. 417, 424 (1996), summarized the law on the subject: an implied-in-fact contract requires a meeting of the minds, which may be inferred from the "conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." The concessioners alleged that there have been such meetings of the mind, at least in some instances. Nonetheless, we agree with the district court that the regulation is facially valid. As we explained earlier, the possibility that one or some concessioners had an implied-in-fact renewal right is not a sufficient basis for holding § 51.102 of the regulations invalid on its face.

This still leaves the allegations in Amfac's complaint that § 51.102 was inconsistent with the savings clause of the 1998 Act as applied to Amfac's concession contract for the Grand Canyon. Complaint of Amfac Resorts at ¶¶ 21, 41. Amfac entered into that contract in 1969. The contract expired on December 31, 2001, after the district court's judgment. Amfac turned out to be the only offeror and so the government argues that its as-applied challenge to the right-of-renewal regulation is moot: "Amfac can have no 'preference' for [the Park Service] to consider when there are no other offerors." Brief for Appellees at 33. Even if Amfac eventually won the Grand Canyon contract, a subject about which we are not informed, we do not believe its as-applied challenge would necessarily be moot. Amfac argues that because § 51.102 threw its alleged implied renewal right in doubt, it "was forced to bid more generously for the Grand Canyon contract than it otherwise would have." Reply Brief for Appellants at 16. If this assertion can be proven, *see Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), then Amfac continues to suffer an injury and the case is not moot. *See Scheduled Airlines Traffic Offices* v. *Dep't of Def.*, 87 F.3d 1356, 1358 (D.C.Cir.1996).

Amfac can succeed in its claim that the regulation is invalid as-applied to its 1969 Grand Canyon contract only if it can prove the essential predicate — that the regulation, in

contradiction to the savings clause of the 1998 Act, deprived it of a contractual right. Amfac therefore should be allowed to adduce proof of its alleged implied right of renewal and should be permitted reasonable discovery to this end. The district court refused to allow any discovery on the ground that judicial review of the regulation must be confined to the administrative record, except in limited circumstances not presented here. 143 F. Supp. 2d at 10-13. *See Am. Bankers Ass'n* v. *Nat'l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C.Cir.2001); *Esch* v. *Yeutter*, 876 F.2d 976, 991-92 (D.C.Cir.1989). We said in *American Bankers*, with respect to a claim that a regulation conflicted with a statute, that the court did not even need the administrative record to determine the validity of the regulation. 271 F.3d at 266-67. But we were speaking there of a facial attack on the regulation. We agree with the district court's denial of discovery to that extent. Amfac's as-applied claim is another matter. Its evidence of an implied renewal right would not be presented to show what the Park Service did or did not consider in promulgating § 51.102 of the regulations. It would be presented instead to show that the regulation would deprive it of a contractual right in contravention of the savings clause in the 1998 Act. In this respect, the evidence Amfac proposes to adduce is akin to proof of its injury. Those challenging agency action must establish that they have standing and to do this, they must prove that the action causes injury to them. *Lujan*, 504 U.S. at 560-61. They are not confined to the administrative record. Far from it. Beyond the pleading stage, they must support their claim of injury with evidence. *Id.* So here. In mounting an as-applied challenge to a regulation, whether in defense of an enforcement action or as here in an action for a declaratory judgment, the party making the challenge may — indeed, in most instances must — present evidence outside the administrative record to show why its particular circumstances render the regulation unlawful.

We therefore reverse the district court's grant of summary judgment on Amfac's as-applied challenge to the prospectus for concessions at the Grand Canyon National Park. In doing so, we recognize that one of the claims of another plaintiff, Hamilton Stores, Inc., might be construed as an as applied challenge similar to that of Amfac. Complaint of Hamilton Stores, Inc. at ¶ 21. But the concessioners' brief presents no argument to this effect; in fact, neither the concessioners' brief nor their reply brief even mentions this portion of the Hamilton Stores complaint. We thus view the claim, which the district court rejected, as having been waived on appeal. *See, e.g., Doe* v. *Dist. of Columbia*, 93 F.3d 861, 875 n.14 (D.C.Cir.1996) (per curiam).

II.

A.

The 1998 Act, as did the 1965 Act, recognized that the United States owns all capital improvements constructed on federal land within the National Park System. 16 U.S.C. § 5954(d). Nonetheless, the 1998 Act gave concessioners a "leasehold surrender interest" in any "capital improvement" the concessioner "constructs" "pursuant to a concession contract." 16 U.S.C. § 5954(a). The Act defines "capital improvement" as "a structure, fixture, or nonremovable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U.S.C. § 5954(e). When the concession contract expires or is terminated, the incumbent is entitled to receive from its successor (or the government) the value of this interest. 16 U.S.C. § 5954(c). The amount of each concessioner's "leasehold surrender interest" — or, as the parties call it, LSI — is "equal to the initial value (construction cost of the capital improvement), increased (or decreased)" by a percentage measured by the Consumer Price Index, less depreciation. 16 U.S.C. § 5954(a)(3). If the expiring concession contract is renewed, the concessioner's LSI carries over. 16 U.S.C. § 5954(b).

The plaintiff-concessioners are unhappy with the Park Service's regulations implementing these and other LSI provisions of the 1998 Act. They say that "'capital improvement' is a well-recognized technical accounting term that all companies, as a matter of financial reporting, tax accounting, and sound business practice use to distinguish upgrades to facilities from ordinary 'repair and maintenance' costs." Brief for Appellants at 41. For support they cite an affidavit from an accountant submitted by Amfac in the district court. But the district court refused to consider, in this facial challenge, affidavits not submitted as part of the administrative record, 142 F. Supp. 2d at 73, and so shall we. Concessioners have not attempted to show why affidavits outside the agency record should be considered. See Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 341-54 (1984). Still, we may acknowledge the standard accounting definition of capital expenditure — an expenditure that extends the useful life of the asset or increases the asset's value, and is not repair and maintenance. Whether an expenditure fits within the first category and thus must be depreciated or amortized, or the other category and thus must be expensed, often calls for difficult, fact-intensive judgments. *See* GLENN A. WELSCH & CHARLES T. ZLATKOVICH, INTERMEDIATE ACCOUNTING 443-46 (8th ed.1989); GARY L. SCHUGART, ET AL., SURVEY OF ACCOUNTING 197-212 (6th ed.1988); GLENN A. WELSCH & DANIEL G. SHORT, FUNDAMENTALS OF FINANCIAL ACCOUNTING 448-49 (5th ed.1987). As to tax accounting, which the concessioners invoke without any citation to the law, we think this is entirely beside the point. The tax code states that no deduction shall be allowed for "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." 26 U.S.C. § 263. In practice, there is a decided tilt to capitalizing many items because deductions are, as the Supreme Court put it in

INDOPCO, Inc. v. *Commissioner*, 503 U.S. 79, 84 (1992), "strictly construed." That rule of interpretation, of course, has no bearing on whether a particular expenditure by a concessioner should be treated as an addition to its LSI. Besides, we do not understand what the concessioners see as the problem here. The regulation of the Park Service repeats, word for word, the statute's definition of "capital improvement." *Compare* 16 U.S.C. § 5954(e) *with* 36 C.F.R. § 51.51. To the extent the concessioners are claiming that it was incumbent upon the Park Service to add a gloss to the statutory definition, a gloss drawn from accounting standards, they are mistaken, as the district court held. *See* 142 F. Supp. 2d at 83. While agencies may have leeway in interpreting the statutes they administer, there is no rule of law compelling them to embellish what Congress has enacted.

The concessioners also complain about § 51.67 of the regulations, 36 C.F.R. § 51.67, and the "Repair and Maintenance Reserve" in the Park Service's "Standard Concession Contract," 65 Fed. Reg. at 26,069. Section 51.67 provides that concessioners do not earn LSI "for repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation." "Major rehabilitation" is defined in 36 C.F.R. § 51.51 as a pre-approved "comprehensive rehabilitation" project the "construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure." (The phrase "repair and maintenance" is not defined, in the regulations or in the 1998 Act.) The Standard Concession Contract requires concessioners to establish a reserve fund for repairs and maintenance projects, which "may include repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects." 65 Fed. Reg. at 26,069.

The concessioners object that § 51.67 allows LSI only for "projects costing more than 50% of a structure's replacement

costs...." 36 C.F.R. § 51.67. What types of "projects" they do not say. If the project is a "capital improvement" it is added to the LSI no matter what the cost of construction. See 142 F. Supp. 2d at 83. If the project is for repair and maintenance it does not qualify, as even the concessioners agree. The 50% regulation — § 51.67 — deals with the question whether an outlay that would otherwise be considered an expenditure for repair and maintenance should constitute a capital improvement because, for instance, the repairs are so extensive. How a particular project should be classified will depend greatly on the particular facts, as it does even in tax cases. *See INDOPCO, Inc.*, 503 U.S. at 86. Nonetheless, the parties quarrel about hypothetical projects. The Park Service says that if a concessioner replaced a damaged dry wall or a rotted beam in a building these would not qualify as capital improvements and thus would not be included in the concessioner's LSI. Brief for Appellees at 36; 65 Fed. Reg. at 20,656. The concessioners argue that the cost of replacing a hotel's brick fireplace would be included. 142 F. Supp. 2d at 83. Replacement of a foundation, according to the concessioners, also would clearly be a capital improvement; according to the Park Service it would not qualify because a foundation is "merely a component of a structure," rather than a "structure, fixture or nonremoveable equipment." *Compare* Brief for Appellants at 44 *with* Brief for Appellees at 39. This last dispute arises because the repair and maintenance reserve clause in the standard contract mentions foundations. But all the clause says is that repair and maintenance "may" include repair or replacement of foundations. 65 Fed. Reg. at 26,069.

The district court, after considering these arguments and others, thought it could not give a definitive answer to the issues thus posed. Echoing *Reno* v. *Flores*, 507 U.S. at 301, and *NCIR*, 502 U.S. at 188, without citing the cases, the court ruled as follows: "the Court cannot say that the regulation, on its face, will be unlawful in its every application. Thus,

this challenge to the regulation must fail." 142 F. Supp. 2d at 85. The court was referring only to the concessioners' attack on the "Repair and Maintenance Reserve" clause but we think its reasoning applies equally to the 50% rule in § 51.67. It is entirely possible that a project calling for repairs to a roof, the replacement of floor boards, the renovation of wiring and plumbing, and so forth would not ordinarily qualify as a "capital improvement." Yet if the total cost of the repair project exceeded 50% of the pre-repair value of the structure it would be added to the LSI. *See* 36 C.F.R. §§ 51.51, 51.67. In that circumstance a concessioner would have no cause for complaint. On the other hand, if the rehabilitation project satisfied the statutory and regulatory definition of a "capital improvement" it would be unlawful for the Park Service to invoke § 51.67 and refuse to treat the expenditure as an addition to the concessioner's LSI. We do not suggest that the Park Service would do anything of the sort. *See* 65 Fed. Reg. at 20,656-57. Our point is that on the face of the regulations, the most we can imagine is that in some applications — depending on how the Park Service administers the LSI regulations — there may be a conflict with the statute. That is not a sufficient basis for holding the regulations unlawful on their face, for the reasons given in part I.B. of this opinion.

B.

The concessioners have two other problems with the LSI regulations. The first relates to 16 U.S.C. § 5954(a)(3) and the valuation of LSI: each concessioner's "leasehold surrender interest is equal to the initial value (construction cost of the capital improvement), increased (or decreased)" by a percentage measured by the Consumer Price Index, less depreciation. The implementing regulation, 36 C.F.R. § 51.51, defines "construction cost" as "the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement...." "Eligible direct and indirect costs" are costs "in amounts no higher than those prevailing in the locality of the project," *id.* It is this "local-

ity" limitation to which the concessioners object. Projects in national parks, they tell us, are almost always more expensive to construct than "similar private projects in nearby localities, and Congress could not reasonably have intended that concessioners swallow such costs without LSI credit," a point the Park Service does not dispute. Brief for Appellants at 47-48. But as the Park Service points out, the concessioners' argument assumes that "locality" means outside the national park. The regulations do not so state and we see no basis for indulging in that assumption. It may be that the Park Service's particular interpretation regarding a particular project in a particular national park could unreasonably limit the valuation of a concessioner's LSI. But that is no reason to hold that the regulation conflicts with the statute or that it is arbitrary. If a concessioner has its own construction company, as some apparently do, nothing in the 1998 Act requires the Park Service to accept whatever amount the concessioner decides to charge itself for the construction work. *See* 65 Fed. Reg. at 20,651. Like the district court, we therefore sustain the regulation.

The concessioners' remaining problem with the LSI regulations deals with 16 U.S.C. § 5954(a)(5): if the concessioner "makes a capital improvement to an existing capital improvement in which the concessioner has a leasehold surrender interest, the cost of such additional capital improvement shall be added to the then current value of the concessioner's leasehold surrender interest." Their claim is that § 51.65 of the regulations conflicts with this provision. The regulation states:

> A concessioner that replaces an existing fixture in which the concessioner has a leasehold surrender interest with a new fixture will increase its leasehold surrender interest by the amount of the construction cost of the replacement fixture less the construction cost of the replaced fixture.

36 C.F.R. § 51.65. This regulation is unlawful, according to the concessioners, because there is nothing in the statute allowing subtractions from a concessioner's LSI. They also believe the calculations required by the regulation would be an administrative nuisance. In the Grand Canyon concession, for instance, there are about 300 structures with many thousands of fixtures.

The district court sustained the regulation for reasons given by the Park Service, reasons we also find persuasive. Without the regulation, concessioners would receive a windfall every time they removed a fixture and replaced it with a new one:

> If a [concessioner] with a leasehold surrender interest in the hotel were to replace the hotel furnace once every five years for 15 years, the plaintiffs' proposed accounting would be to increase the leasehold surrender interest three separate times by the cost of the furnace. Under this approach, the [concessioner] would hold a leasehold surrender interest equal to four furnaces, even though the hotel would only contain one.

142 F. Supp. 2d at 88 n.16. As to the concessioners' textual argument, it is true that the statute speaks only of additions not subtractions. But under the regulation the calculation is of net additions to LSI — the difference between the cost of the new fixture and the discarded one. When concessioners replace fixtures for a greater cost, their LSI will increase. The regulation deals with how much the increase should be. The statute, which speaks in terms of additions not replacements, does not address that subject. We therefore reject the concessioners' argument that § 51.65 of the regulations is inconsistent with 16 U.S.C. § 5954(a)(5). We reject as well their argument that the regulation is unreasonable. The Park Service's policy of avoiding the windfalls that would result without the regulation is reason enough to

sustain § 51.65, despite the administrative burdens it may generate.

III.

The concessioners claim the Park Service wrongly excluded concessions contracts from coverage under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* *See* 36 C.F.R. § 51.3; 65 Fed. Reg. at 20,635.

Enacted in 1978, the Contract Disputes Act provides an alternative forum for government contract disputes. Rather than seeking judicial relief in the Court of Federal Claims, a contractor may appeal decisions by a contracting official to an administrative board within that agency. 41 U.S.C. § 607. The board's decision may be appealed to the U.S. Court of Appeals for the Federal Circuit. 41 U.S.C. § 607(g).

Section 51.3 of the regulations states that concession contracts are not "contracts" within the meaning of the Contract Disputes Act. 36 C.F.R. § 51.3 (2000). With this we agree. The Act applies to any "express or implied contract" for the "procurement" of "property," "services" or "construction." 41 U.S.C. § 602(a)(2). A procurement contract, the Park Service reasoned, "is a contract for which the government bargains for, and pays for, and receives goods and services." 65 Fed. Reg. at 20,635. Concession contracts are not of that sort. Their function is not to procure services or goods for the government. Instead, as the Park Service put it, concession contracts "authorize third parties to provide services to park area visitors." *Id.* While the Park Service does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions, its reasoning finds support not only in the terms of that statute but also in the National Parks Omnibus Management Act of 1998, under which the Park Service may enter into concession contracts "to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to" national parks. 16 U.S.C. § 5952. The Committee reports ac-

companying the 1998 Act also concluded that concession "contracts do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise," S. REP. NO. 105-202, at 39 (1998); H.R. REP. NO. 105-767, at 43 (1998), a position the Park Service had reached earlier with respect to concession contracts under the 1965 Act. *See, e.g.*, Concessions Contracts and Permits, 57 Fed. Reg. 40,496, at 40,498 (Sept. 3, 1992) (reiterating that the Park Service "has never considered [concessions contracts] a type of federal procurement contract"). The Court of Federal Claims, considering the nature of concession contracts, also concluded that "this arrangement does not constitute a procurement, but is a grant of a permit to operate a business." *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993). The decision rested, in part, on the fact that "the government is not committing to pay out government funds or incur any monetary liability." *Id.*

As against this analysis, the concessioners cite several decisions of the Interior Department Board of Contract Appeals [IBCA], a body created by Interior Department regulations, *see* 41 U.S.C. § 607(a); 43 C.F.R. § 4.100 *et seq.* (2000). The IBCA has held that the Contract Disputes Act applies to concession contracts. *See, e.g., Appeal of Watch Hill Concession, Inc.*, IBCA No. 4284-2000, 2001 WL 170911 (2001); *Appeal of Nat'l Park Concessions, Inc.*, IBCA No. 2995, 1994 WL 462401 (1994). But the decisions of this body "on any question of law shall not be final or conclusive." 41 U.S.C. § 609(b). And the IBCA's rationale for determining that concession contracts are procurement contracts is flawed. In its first opinion to consider the issue, the IBCA acknowledged that the Contract Disputes Act does not cover all contracts but then assumed that the Act *does* apply unless coverage is explicitly foreclosed. *See Appeal of R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at 24-25 (Mar. 24, 1989). Nothing in the Act suggests such a sweeping presumption. Another IBCA opinion states that if any

"benefit" can be traced to the government, then the Contract Disputes Act must apply. *Appeal of Nat'l Park Concessions, Inc.*, IBCA No. 2995, 1994 WL 462401, at 14 (Aug. 18, 1994). The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C. § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

IV.

The concessioners' last complaint deals with the portion of the new regulations designed to deal with transactions involving corporate concessioners (*see* 65 Fed. Reg. at 20,661). One of the regulations states:

> The concessioner may not assign, sell, convey, grant, contract for, or otherwise transfer (such transactions collectively referred to as "assignments" for purposes of this part), without the prior written approval of the Director, any of the following:
>
> (a) Any concession contract;
>
> ...
>
> (c) Any controlling interest in a concessioner or concession contract;
>
> ...

36 C.F.R. § 51.85(a) & (c). A similar regulation prohibits, without prior approval, any "encumbrance" of a "controlling interest in a concessioner." 36 C.F.R. § 51.86(c). In the concessioners' view, the regulations extend beyond the statute. The 1998 Act forbids any "concessions contract" from being "transferred, assigned, sold, or otherwise conveyed or pledged by a concessioner" without government approval. 16 U.S.C. § 5957(a). Approval must be given unless "the

entity seeking to acquire a concessions contract is not qualified" or the transfer or conveyance would otherwise adversely affect performance of the contract in a manner specified in 16 U.S.C. § 5957(b). The crucial difference between the regulations and the statute, the concessioners say, is that the regulations require approval of transactions dealing not only with the transfers or assignments of concession contracts but also with changes in control of the concessioner. The Park Service responds that its change-of-control rule ensures that unqualified persons do not wind up holding concession contracts. Unlike individuals, a corporation can in effect transfer a concession contract by selling its stock to another entity. 65 Fed. Reg. at 20,661. As the Park Service sees it, the regulations are a permissible construction of the statutory phrase "otherwise conveyed or pledged," an argument with which the district court agreed. 142 F. Supp. 2d at 90-91.

How the Park Service regulations will operate does not exactly leap from the pages of the Federal Register. It is easy enough to see that if X corporation wanted to sell all its assets, including its concession contract, it would first have to get approval of the Director of the Park Service. No one doubts that the regulation properly requires as much. The Park Service also believes that if the non-public X corporation structured the transaction as a sale of 100% of its stock instead of an asset sale, there would be no functional difference as far as the concession contract is concerned. *See Alarm Indus. Communications Comm.* v. *FCC*, 131 F.3d 1066, 1070-71 (D.C. Cir.1997). It is only a short leap to the conclusion that if, rather than a sale of 100% of the stock, X corporation sold some lesser amount representing a controlling interest, this too should require prior approval. The regulations define controlling interest in much the same manner as the Securities and Exchange Commission, *see, e.g.*, 17 C.F.R. § 210.1-02(g), that is, not in terms of any particular percentage of outstanding voting stock. Rather, a "controlling

interest" in a corporate concessioner constitutes "sufficient outstanding voting securities" of "the concessioner or related entities that permits the exercise of managerial authority" over the concessioner. 36 C.F.R. § 51.84.

Beyond these simple examples we enter a vale of ambiguity. Transactions of the sort just described are not the focus of the concessioners' concern. Their problem is that the regulations--as they read them — require Park Service approval of transactions undertaken by the concessioners' "shareholders or their affiliates." Brief for Appellants at 55. But do they? The shareholders of incorporated concessioners are typically not individuals but parent corporations. The Park Service reports that "many" of its concessioners "are corporations that hold a concession contract as their exclusive business activity" and that almost all of the largest concessioners are "wholly owned subsidiaries of larger corporations." 65 Fed. Reg. at 20,661. One of the plaintiffs here, ARAMARK Sports and Entertainment Services, Inc., is a wholly-owned subsidiary of ARAMARK/HMS Company, which is a wholly-owned subsidiary of ARAMARK Sports and Entertainment Group, Inc., which is a wholly-owned subsidiary of ARAMARK Corporation, which is listed on the New York Stock Exchange. Brief for Appellants at iv.

Wholly-owned means, in the case of incorporated subsidiaries, that the parent corporation holds all of the subsidiary corporation's stock. What worries the concessioners is that transactions by the parent could potentially require Park Service approval if a change in control would result. But the regulations do not read that way. The critical provision is 36 C.F.R. § 51.8. It speaks only of sales, assignments, conveyances and so forth by the "concessioner." The term "concessioner," in regulatory parlance, "is an individual, corporation, or other legally recognized entity that duly holds a concession contract," 36 C.F.R. § 51.3 — a definition that at least on its face encompasses only the subsidiary corporation, not the parent. It therefore appears that if the parent corporation

engages in a sale-of-control transaction, this would not require approval because the concessioner — the subsidiary corporation — would not be doing the selling. The attorneys for the Park Service say, in their brief, that the regulations do indeed cover transactions by the corporate concessioner's parent company. Brief for Appellees at 53-54. But they do not parse the language of the regulations, and they point to nothing in the Park Service's explanation of its regulations that goes so far. In fact, the Park Service justified its regulations on the basis that it would be "anomalous" if a "corporate concessioner" could sell "its stock to a new party (sale of a controlling interest)" without having to seek Park Service approval. 65 Fed. Reg. at 20,661. If, despite the language of the regulations, transactions at the parent level are also supposed to be covered, we are far from certain how the Park Service intends to implement its rules. An investor might begin purchasing stock of the parent corporation of a corporate-concessioner on the open market. Must the concessioner corporation go to the Park Service and ask for approval of the outsider's purchases of the parent when the outsider's percentage of the outstanding shares reaches some magic number? That makes no sense. Neither the concessioner corporation nor the parent corporation has any control over the purchaser. Perhaps this is why the regulation seems to speak only in terms of the concessioner selling its stock. If the regulations do not cover the transaction just mentioned, but do cover a sale of control by a parent corporation, the Park Service would have to justify a rule that allows an outsider, a complete stranger, to gain a "controlling interest" through open market purchases but requires approval before the parent makes a block safe to the same person. Control of the parent, and thus of the subsidiary concessioner, would transfer in both situations, and under the Park Service's theory, so would the concession contract, yet the one transaction would be regulated and the other not.

The short of the matter is that we do not know whether the problems the concessioners identify exist. We cannot be sure that the Park Service will apply its sale-of-control regulations to transactions involving only sales of stock *by* corporate concessioners (as distinguished from open market sales by shareholders or sales by a parent company of its stock). The questions thus raised, and the other questions posed by the many possible forms of corporate restructuring (*see, e.g.*, 1 MARTIN D. GINSBURG & JACK S. LEVIN, MERGERS, ACQUISITIONS, AND BUYOUTS 105 (2001)), present "too many imponderables" to permit judicial review at this time. *Clean Air Implementation Project* v. *EPA*, 150 F.3d at 1200. This aspect of the case, in other words, is not ripe. *See Media Access Project* v. *FCC*, 883 F.2d 1063, 1070 (D.C.Cir.1989). The "classic institutional reason" for postponing review is the "need to wait for a 'rule to be applied [to see] what its effect will be,'" *Louisiana Envtl. Action Network* v. *Browner*, 87 F.3d 1379, 1385 (D.C.Cir.1996) (quoting *Diamond Shamrock Corp.* v. *Costle*, 580 F.2d 670, 674 (D.C.Cir.1978)). The issues here can be presented in a more "concrete" setting. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Ass'n of Am. R.R.*, 146 F.3d 942, 946 (D.C.Cir.1998). The regulations state that "[a]ssignments" without the prior approval of the Park Service will be considered "null and void" and will be viewed as a "material breach of the applicable concession contract which may result in termination of the contract for cause." 36 C.F.R. § 51.88. Whether this means the Park Service will deem transfers of controlling interests in a concessioner's parent as "null and void" is not at all clear. But the prospect certainly can give rise to an interested party's seeking the Park Service's judgment that its proposed transaction does not need approval. A lawsuit could be brought if the concessioner is dissatisfied with the answer. Then at least the court would have some idea of what the Park Service thinks its regulations cover. Then too the validity of the regulations, as thus interpreted, could be deter-

mined in light of the language of the statute, which speaks only of transfers of concession contracts.

The possible hardship to the concessioners in waiting does not alter our conclusion that the issues are not ripe. No concessioner has indicated that a transfer of control is imminent. We therefore have no reason to believe that in the immediate future they will have to alter their conduct to their disadvantage. *Contrast Abbott Labs.*, 387 U.S. at 152. It may be that matters cannot be sorted out without further litigation but that is not the sort of hardship we recognize in evaluating whether a case is ripe for review. *See, e.g., Clean Air Implementation Project*, 150 F.3d at 1206.

Our conclusion that this aspect of the case is not ripe differs from that of the district court, which ruled against the concessioners' claim on its merits. We therefore vacate the district court's judgment in this respect.

* * *

The judgment of the district court is affirmed in part, reversed in part and vacated in part. The case is remanded for further proceedings, consistent with this opinion, on Amfac's as-applied challenge to regulations concerning the preferential right of renewal.

So ordered.

APPENDIX B

United States District Court,
District of Columbia.

AMFAC Resorts, L.L.C., *Plaintiff*,

v.

UNITED STATES Department OF THE INTERIOR, ET AL., *Defendants*.

NATIONAL PARK Hospitality ASSN., *Plaintiff*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Defendants*.

HAMILTON Stores, INC., *Plaintiff*,

v.

UNITED STATES Department OF THE INTERIOR, ET AL., *Defendants*.

ARAMARK SPORTS AND Entertainment SERVICES, INC., *Plaintiff*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Defendants*.

CIV.A. 00-2838, 00-2885, 00-2937, 00-3085.

May 23, 2001.

MEMORANDUM OPINION

LAMBERTH, District Judge.

Now before the Court is a group of cases that implicate a variety of issues, all of which are covered in the defendants' motion to dismiss, and the parties' cross motions for partial

summary judgment. At its heart, the dispute centers on the National Park Service's ("NPS") treatment of current and potential concessioners at various national parks. The plaintiffs — three of which are concessioners and one of which is an association of concessioners — all allege that various NPS regulations are contrary to Congressional pronouncements on national park concession management.

On April 24, 2001, the Court ruled that the plaintiffs were not entitled to discovery beyond the administrative record, and that certain confidential information could be shared with experts, provided various conditions were observed. The Court also ruled that day that Delaware North, Inc., a concessioner, was entitled to intervene in this matter on behalf of the defendants. Delaware North is a competitor of the plaintiffs, and seeks to become a concessioner in certain parks where the plaintiffs currently hold concession contracts.

To summarize the Court's holding, the Court first holds that the plaintiffs' Rule 56(f) motion to stay summary judgment proceedings and take discovery must be DENIED.[1] The Court next holds that the defendants' motion to dismiss must be DENIED with respect to the preferential right to renewal issue, but GRANTED with respect two other issues.[2] Finally, the Court holds that the disputed regulations are permissible in all respects save one. The defendants' regulations are generally concise, well explained, and responsive to the many comments received from interested parties. The defendants only run afoul of the law in their requirement that concessioners bid on prospectuses or else lose their preferential right of renewal. An order consistent with this Opinion shall issue separately this date.

[1] This issue was substantially addressed in the Court's April 24, 2001 Opinion. In that Opinion, the Court determined that the plaintiffs were not entitled to extra-record discovery. *See* Memorandum and Order, Apr. 24, 2001, at 11-13.

Federal Rule of Civil Procedure 56(f) "allows a summary judgment motion to be denied; or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). As the plaintiffs are not entitled to any discovery, a stay of proceedings would not increase the plaintiffs' "opportunity to make full discovery." Thus, the plaintiffs' Rule 56(f) motion must be denied.

As a preliminary matter, the Court notes its jurisdiction under 28 U.S.C § 1331. The plaintiffs' well-pleaded complaints present an issue of federal law, and all parties concede as much. *See* Brief for Plaintiffs, Feb. 28, 2001, at 14-15; Brief for Defendants, Apr. 9, 2001, at 21. The law applicable to the resolution of this case is federal law, whether in constitutional, statutory, or common law form. *See United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943)) ("[A]gencies derive their authority to effectuate ... transactions from specific Acts of Congress passed in the exercise of 'constitutional function or power', [and thus] their rights, as well, should derive from a federal source.").

I. THE DEFENDANTS' MOTION TO DISMISS

A. Background

The plaintiffs have been concessioners in various national parks for the past 30 years.[3] Their concession contracts are

[2] These two issues are the plaintiffs' claims regarding the timing of compensation for a concessioner's leasehold surrender interest, *see* Part.II.N, and Hamilton Stores' claim regarding the minimum franchise fee for the Yellowstone Park concession contract. *See* Part I.B.3.b.

[3] The Court notes that one of the plaintiffs, the National Park Hospitality Association ("NPHA"), is not actually a concessioner. Rather, it is an association of concessioners. Nonetheless, as the

set to expire on December 31, 2001, and they are currently interested in continuing as concessioners. To achieve this goal, the plaintiffs must participate in a contracting process dictated by the NPS. In the spring of 2000, the NPS modified this process in light of recent legislation.[4]

The new contracting process is chiefly controlled by an NPS regulation entitled "*Concession Contracts*." 65 Fed. Reg. 20630 (Apr. 17, 2000); see also 36 C.F.R. 51. This regulation, states the NPS, has "three major purposes": (1) to enhance the competitiveness of contract bidding by diminishing various concessioners' "preference in renewal", (2) to convert the valuation of concessioners' capital improvements from a "possessory interest" valuation to a "leasehold surrender interest" valuation, and (3) to explain various smaller provisions that "concession contracts will contain in the implementation of the 1998 Act." 65 Fed Reg. 20630-31 (Apr. 17, 2000); 36 C.F.R. 51. This regulation is supplemented by a second regulation, entitled "Standard Concession Contract", which incorporates the changed terms into a new contract. *See* 65 Fed. Reg. 26052. It is these two regulations, as well as any "prospectuses"[5] issued pursuant thereto, that the plaintiffs challenge in multiple respects.

NPHA comes before the Court on behalf of its members, and for ease of reference, the Court refers to the NPHA as a "concessioner."

[4] On November 13, 1998, Congress significantly altered concession management policies by enacting the National Parks Omnibus Management Act of 1998. 16 U.S.C. §§ 5951-5966. As the motion to dismiss concerns only standing and ripeness issues, it is not necessary to discuss the details of the Act at this point.

[5] In this context, a "prospectus" is in invitation to bid on a contract. It contains various information necessary to formulate a bid, including a copy of the specific contract up for bidding.

The defendants move to dismiss two of the plaintiffs' many claims. Specifically, the defendants claim that the law of standing and ripeness prevent the plaintiffs from pursuing (1) their joint claim for a preferential right of renewal, and (2) Hamilton Stores' claim of unreasonable franchise fee.[6] These two claims will now be shortly described.

1. The Plaintiffs' Joint Claim of a Contractual Right to Preferential Renewal

All four plaintiffs claim that their concession contracts give them a preferential right of renewal. This right would give each plaintiff the right to match the best bid made on a prospectus, and thereby obtain the concession contract. The defendants deny that this right even exists, but also argue that, even if it does, this claim must be dismissed because it "essentially concerns what might happen to [the plaintiffs] upon the expiration of [their] Contracts." Brief for Defendants, Jan. 19, 2001, at 1-2. That is, as the disputed concession contracts have yet to be awarded, the plaintiffs have yet to be denied any contract. It is quite possible, argue the defendants, that the plaintiffs may obtain the sought after concession contracts, and thus suffer no harm from the loss of their preferential right of renewal.

2. Hamilton Stores' Claim on the Yellowstone Park Prospectus' Franchise Fee Requirement

By statutory mandate, the NPS is to set a minimum franchise fee based "upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved." 16 U.S.C. §§ 5952(4), 5956(a). The probable value of a contract's privileges, in turn, "shall be based on a reasonable opportunity for net profit in relation to

---

[6] The defendants also move for dismissal on various jurisdictional grounds, but concede that the Court, at the least, has federal question jurisdiction. *See* Brief for Defendants, Apr. 9, 2001, at 21.

the capital invested and the obligations of the contract." 16 U.S.C. § 5956(a). Thus, by statute, the NPS is required to determine the capital investment that a new concessioner will likely make if awarded the contract.

Generally speaking, when a new concessioner obtains a concession contract, that concessioner is required to purchase the exiting concessioner's inventory, equipment, and real property interests. AR, 17-18. These purchases, among others, make up the new concessioner's "capital investment." The greater a concessioner's capital investment will be, the lower the NPS sets the minimum franchise fee in the prospectus. Thus, an undervaluing of an exiting concessioner's inventory, equipment and real property interests will result in an overestimate of the minimum franchise fee required of new concessioners. This overestimate, in turn, might be unlawful if it were to deny a concessioner a "reasonable opportunity for net profit." 16 U.S.C. § 5956(a).

Hamilton Stores alleges that its inventory, equipment, and real property interests have been significantly undervalued and that the resulting minimum franchise fee for the Yellowstone contract is too high.[7] This, Hamilton argues, "flatly violates the statutory rule requiring NPS to offer concession contracts that would provide the concessioner with 'a reasonable opportunity for net profit in relation to capital invested.'" Brief for Hamilton Stores, Feb. 28, 2001, at 1.

It is important to recognize that, although Hamilton is alleging a miscalculation of its *current* possessory interests,

[7] The NPS hired Dornbusch & Company to value Hamilton Stores' inventory, equipment, and real property interests. *See* AR, 1748-62 (memorandums by Dornbusch & Co. explaining the valuations of Hamilton Stores' assets, and the appropriate franchise fee in light thereof).

its claim is from the perspective of a *future* concessioner. That is, the harm for which Hamilton is seeking redress is its *future* disbursement of excessive franchise fees, *not* the insufficient compensation paid to it as an exiting concessioner.[8]

The Court now considers the defendants' arguments to determine whether the plaintiffs are properly before this Court.

B. Analysis

1. Standard of Review

If a plaintiff has failed "to state a claim upon which relief can be granted," a court may grant a defendant's motion to dismiss. Fed. R. Civ. P. 12(b)(6); *see also Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984); *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C.Cir.2000). In evaluating a motion to dismiss, a court must construe the complaint

[8] Hamilton Stores' compensation for its inventory, equipment, and real property interests is calculated under the terms of its concession contract, not under any statute or regulation. For example, section 12 of the Hamilton Stores' contract provides extensive directions on the determination of Hamilton's possessory interests. See Hamilton Stores Concession Contract, AR 212-13 (providing that the "fair value of a possessory interest shall be the sound value of the improvement to which it relates at the time of transfer of such possessory interest, without regard to the term of the contract. The sound value of any structure, fixture, or improvement shall be determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value").

Thus, if Hamilton were alleging underpayment of its possessory interests, its claim would lie in contract law, not the arbitrary and capricious standard of the APA and the Tucker Act.

* * * * * *

in the light most favorable to the plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler* v. *United States*, 617 F.2d 605, 608 (D.C.Cir.1979); *see also Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Wiggins* v. *Hitchens*, 853 F. Supp. 505, 508 n.1 (D.D.C.1994) (citing 2A Moore's Federal Practice, § 12.07, at 63 (2d ed.1986) (footnote omitted); *Haynesworth* v. *Miller*, 820 F.2d 1245, 1254 (D.C.Cir.1987)).

2. The Law of Standing and Ripeness

The doctrines of standing and ripeness are "designed to test the fitness of controversies for judicial resolution." *Louisiana Envtl. Action Network* v. *Browner*, 87 F.3d 1379, 1382 (D.C.Cir.1996). They both contain a "blend of constitutional requirements and prudential considerations." *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464-471 (1982); *CC Distributors* v. *United States*, 883 F.2d 146, 149 (D.C.Cir.1989).

(a) Standing

To have constitutional standing, a plaintiff must show that (1) it has "suffered an injury in fact" that is (2) "fairly ... traceable to the challenged action of the defendant" and which (3) will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted); *see also Allen* v. *Wright*, 468 U.S. 737, 756 (1984); *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975).

A plaintiff's alleged injury qualifies as a constitutional "injury in fact" if the plaintiff suffers an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); *Los Angeles* v. *Lyons*, 461 U.S.

95, 102 (1983); *Sierra Club* v. *Morton*, 405 U.S. 727, 740-741, n.16 (1972). Of importance in the case sub judice, this Circuit has repeatedly recognized as an injury the "loss of ... opportunity to compete for a contract." *CC Distributors*, 883 F.2d at 150; *see also Lepelletier* v. *FDIC*, 164 F.3d 37, 42 (D.C.Cir.1999); *DIREC TV, Inc.* v. *FCC*, 110 F.3d 816, 829 (D.C.Cir.1997).

In *CC Distributors* v. *United States*, this Circuit considered a government contractor's challenge to an Air Force policy which diminished the contractor's opportunity to secure contracts. The government argued that, since the contractor had not yet been denied a contract, it had not yet sustained a constitutional injury. *C.C. Distributors*, 883 F.2d at 149-50. The Court disagreed, and held that "a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit ... even though the plaintiff may not be able to show that it was certain to receive the benefit had it been accorded the lost opportunity." *Id.* at 150. In support of this, the Court noted a broad variety of caselaw that supports the general proposition that the "denial of an opportunity" is a cognizable injury. *Id.* at 150 (citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978); *West Virginia Ass'n of Comm. Health Centers* v. *Heckler*, 734 F.2d 1570 (D.C.Cir.1984); *National Ass'n of Neighborhood Health Centers, Inc.* v. *Mathews*, 551 F.2d 321 (D.C.Cir.1976)).

Apart from its constitutional dimensions, standing also has a prudential aspect. This aspect requires that a court determine whether the plaintiff's interests are "arguably within the zone of interests to be protected or regulated by the statute ... in question." *Association of Data Processing Serv. Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). In other words, a court should ask "whether, in view of Congress' evident intent to make agency action presumptively reviewable ... Congress intended for [a particular] class [of

plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987); *see also CC Distributors*, 883 F.2d at 151.

(b) Ripeness

Although the ripeness doctrine is often understood to overlap with the standing doctrine, *see Wyoming Outdoor Council* v. *United States Forest Serv.*, 165 F.3d 43, 48 (D.C.Cir.1999), it retains a separate analytical framework. The framework reveals the doctrine's dual pedigree — pedigree that is partially traceable to Article III, but mostly traceable to the court's prudential goals of avoiding "abstract disagreements" and "premature adjudication." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967); see also 13A Charles A. Wright, Arthur R. Miller and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3532.1, at 118-19 (2d ed.1984) (recognizing the dual underpinnings of the single analytical framework).

In considering a claim's ripeness, a court is to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1988); *Abbott Laboratories*, 387 U.S. at 149. A claim's fitness for judicial resolution hinges on "whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 621 (1998). From a more pragmatic perspective, courts often defer judgment if intervening circumstances are likely to make "[judicial] resolution of the dispute ... unnecessary." *Edison Elec. Institute* v. *U.S. E.P.A.*, 996 F.2d 326, (D.C.Cir.1993); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474, 479 (D.C.Cir.1986). With regard to the hardship caused by delayed review, courts generally consider hardship to be a "secondary concern" and only evaluate it if there are "doubts about the fitness [prong]." *Consolidated Rail Corp.*

v. *United States*, 896 F.2d 574, 577 (D.C.Cir.1990); *American Petroleum Inst.* v. *U.S. EPA*, 906 F.2d 729, 739 n.13 (1990). In cases where the fitness prong is satisfied, "lack of hardship cannot tip the balance against judicial review." *Id.*; *Askins* v. *District of Columbia*, 877 F.2d 94, 98 (D.C.Cir.1989); *Consolidation Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 824 F.2d 1071, 1081-82 (D.C.Cir.1987).

3. The Defendants' Motion to Dismiss

Viewing these two claims against the law of standing and ripeness, the Court finds that preferential right claim may proceed, but that the franchise fee claim must be dismissed.

(a) The Right to Preferential Renewal

At the outset, it is clear that the plaintiffs' claim of a contractual right to preferential renewal falls squarely within the rule that a loss of opportunity to compete is an injury in fact. The plaintiffs allege that they have a legal right, vested in them through contract, to renew their contract if they can match the next best bid. By preventing them from participating in the bidding process in this fashion, the defendants undeniably infringe upon interests which the plaintiffs claim are "legally protected." *Lujan*, 504 U.S. at 560. An injury in fact thus exists.

From a prudential standpoint, the Court finds little reason to depart from its finding of constitutional standing. As national park concessioners, the plaintiffs are almost per se within the "zone of interests to be protected" by the enactment of a statute titled the "National Parks Omnibus Management Act of 1998." *Association of Data Processing Serv. Orgs.*, 397 U.S. at 153. The plaintiffs are all central players in the concession system which Congress attempted to reform.

With regard to ripeness, the Court finds it appropriate to retain jurisdiction at this time. First, the preferential right of

renewal issue is largely legal; it hinges on statutory and regulatory interpretation, and does not implicate a complicated array of facts. Second, the issue would not "benefit from a more concrete setting," as a fully executed contract would present the Court with substantially the same issues currently under dispute. *Warren Corp.*, 159 F.3d at 621. Moreover, the NPS's policy on this issue is clearly "crystallized" in its final form. *Eagle-Picher Indus.* v. *U.S. EPA*, 759 F.2d 905, 915 (D.C.Cir.1985). The NPS has reviewed and re-reviewed the issue, and promulgated a lengthy regulation and explanation. Furthermore, the NPS has endorsed this view by issuing prospectuses which are consistent with the details enunciated in the regulations. *See* Brief for Plaintiffs, Feb. 28, 2001, at 19.

With regard to the plaintiffs' hardship should judicial review be delayed, the Court need not find any hardship because it has little doubt that the issues are currently fit for judicial review. *See Consolidated Rail Corp.*, 896 F.2d at 577.

(b) Hamilton Stores' Franchise Fee Claim

The Court finds that Hamilton Stores does not have standing to bring its franchise fee claim, and also that the claim is not currently ripe for review.

First, it is entirely conjectural whether the minimum franchise fee of 3.5 percent will provide Hamilton Stores with a "reasonable opportunity for net profit." 16 U.S.C. § 59[illegible]6(a). Not only is it pure conjecture whether Hamilton will obtain the new concession contract, but even if it did, it is even more conjectural whether the franchise fee, together with the future economic environment, will deny it the opportunity for a profit. Thus, Hamilton Stores does not have standing to bring this claim.

Likewise, Hamilton Stores' franchise fee claim is also not ripe. Whether a 3.5 percent franchise fee will permit Hamilton Stores (who may or may not be the new concessioner) a reasonable opportunity for net profit is *not* a "purely legal" issue; to the contrary, it is an issue highly contingent on facts which are currently unknown and unknowable. *Warren Corp.*, 159 F.3d at 621. Moreover, the resolution of this issue would substantially benefit if it were posed in a "more concrete setting." *Id.* It is wholly beyond the judiciary's means to hypothesize on the economic health of national park concessions at some distant time. The Court is not blind to the fact that a 3.5 percent franchise fee may indeed be violative of section 5956(a). If Hamilton obtains the next Yellowstone concession contract, and thereafter determines there is not a reasonable opportunity for profit at a franchise fee of 3.5 percent, Hamilton may bring a claim at that time. Until then, this Court must decline to review the issue.

Hamilton Stores argues at great length that the minimum franchise fee is flawed because the capital asset valuation used to set the fee was itself flawed. Even if the Court were to accept this argument (which it emphatically declines to do), Hamilton has still failed to show that this flawed analysis causes it a current or imminent injury. The injury which Hamilton Stores alleges-the lost opportunity to earn a profit-is contingent upon several independent factors which may or may not occur. The occurrence (or non-occurrence) of any one of these factors could easily make the "resolution of the dispute ... unnecessary." *Edison Elec. Institute* v. *U.S. E.P.A.*, 996 F.2d at 326; *State Farm Mut. Auto. Ins. Co.*, 802 F.2d at 479. Hamilton Stores' franchise fee claim must thus be dismissed for lack of standing and ripeness.

C. Conclusion

For the foregoing reasons, the Court finds that the plaintiffs may continue with their preferential renewal right claim. However, Hamilton Stores may not continue with its fran-

chise fee claim.[9] The Court therefore turns to the cross motions for summary judgment.

II. THE CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is (1) no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Diamond* v. *Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). To survive a motion for summary judgment, the nonmovant must make a "sufficient showing to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322. A "sufficient showing" exists when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248.

B. Applicable Law

This case challenges the regulations and official policy of a federal agency. In considering such matters, Article III courts utilize the rule of deference promulgated in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* requires a court to analyze agency action under a two-step analysis. "First, always, is the question of whether Congress has directly spoken to the issue. If the

---

[9] In addition to the franchise fee claim, the Court dismisses one other claim pursuant to Rule 12(b)(1). *See* Part II.N. That issue did not become discrete until the parties briefed it during the summary judgment proceedings, and is most easily understood in that context.

intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 841. If, however, the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [final action] is based on a permissible construction of the statute." *Id.* A construction is permissible if it is reasonable. The agency's construction, however, need not be the only or most reasonable interpretation, *see id.* at 843 n.11, it must merely be "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). *See also General Elec. Co.* v. *United States Envt'l Protection Agency*, 53 F.3d 1324, 1327 (D.C.Cir.1995).

C. The Contractual Right of Preferential Renewal

1. Background

Almost 85 years ago, the National Park Service was created to oversee our national parks and to "conserve the scenery and the natural and historic objects and the wild life therein and ... provide for the enjoyment of the same." 16 U.S.C. § 1. Throughout this entire period, the NPS has relied on private concessioners for the provision of "lodging, food, merchandising, transportation, outfitting and guiding, and similar activities." 64 Fed. Reg. 20630 (Apr. 17, 2000).

During the 1960s, Congress and the NPS determined that certain incentives were necessary to maintain the continuity of operation in the national parks. With this in mind, Congress enacted the Concessions Policy Act of 1965. Section 20d of that Act stated:

> The Secretary shall encourage the continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiations of new contracts of permits to the concessioners who have performed their obligations

under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d.

After this statute was enacted, the plaintiffs in the instant case all entered into long-term concession contracts with the NPS. None of the contracts contained any provision granting the plaintiffs a preference in the renewal of their contracts.

In 1989, the Department of the Interior began a review of National Park concessions, with the goal of finding ways to enhance concession management. Three years later, in 1992, the Department issued a report making various findings and recommendations for improvement. Among the findings was the observation that the right of preference in renewal enjoyed by incumbent concessioners significantly impeded the competition for concession contracts. See 57 Fed. Reg. 40508, 40508 (Sept. 3, 1992).

In 1998, after the NPS tried to address this issue with regulations, Congress enacted the National Parks Omnibus Management Act of 1998 (the "1998 Act"). 16 U.S.C. §§ 5951-5966. Section 5952 of the Act orders that the

Secretary shall not grant a concessioner a preferential right to renew a concessions contract, or any other form of a preference to a concessions contract.[10]

16 U.S.C. § 5952(7)(A). Although the 1998 Act expressly repealed the 1965 Act, Section 415 of the 1998 Act stated that:

[10] Part (7)(B) of Section 5952 does permit the Secretary to grant this right to a small category of concessioners, specifically "outfitter and guide services and small [concession] contracts." The issues surrounding the rights created by this provision are not addressed here, but rather in section E, *infra*.

the repeal of [the 1965 Act] shall not affect the validity of any concessions contract or permit entered into under [the 1965 Act] but the provisions of this [Act] shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit.

Pub. L. No. 105-391, Title IV, § 415(a), Nov. 13, 1998.

After the passage of the 1998 Act, the NPS reformed certain concession contract regulations to make them, in its opinion, consistent with the new statute. On the issue of whether contracts entered into under the 1965 Act contain a right to a preference in renewal, the NPS stated:

> In circumstances where a 1965 Act concession contract does not make express reference to a preference in renewal, it is the final administrative decision of the NPS ... that their repeal of the 1965 Act's preference in renewal by the 1998 Act is applicable to holders of 1965 Act concession contracts.

65 Fed. Reg. 20630, 20664 (Apr. 17, 2000); *see also* 36 C.F.R. § 51.102 (codifying the presumption against a preferential renewal right in a 1965 Act contract, unless express language indicates otherwise).

It is this agency policy which the plaintiffs urge the Court to hold contrary to law. The Court now undertakes that evaluation.

2. Analysis

The lawfulness of the defendants' regulations turns on whether the plaintiffs each have a contractual right to preferential renewal. If the plaintiffs do have such a right, then the NPS's regulations are unlawful because they unilaterally delete a valid contract term. If the plaintiffs do not have such a

right, then the NPS's regulations are lawful in that they have not diminished any of the plaintiffs' contractual rights and are an otherwise reasonable interpretation of the 1998 Act. In making this determination, the Court's review is necessarily limited to the administrative record. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The Court begins by noting the obvious, which is that no contract between the NPS and the plaintiffs contains an *express* term granting the concessioners a preferential right to renewal. Thus, the plaintiffs can only be found to have this right if one of three circumstances exists: (1) the right derives from statute, (2) the right derives from an implied contract, or (3) the right derives from an implied term in the current concession contracts. The Court finds that none of these situations exist, and therefore that the plaintiffs do not have a right to preferential renewal.

(a) Contract Rights Established by Statute

"The principal function of a legislature is not to make contracts, but to make laws." *National R.R. Passenger Corp.* v. *Atchison Topeka & Santa Fe Ry.*, 470 U.S. 451, 466 (1985). Thus, there exists a strong "presumption ... that a law is not intended to create private contractual or vested rights." *Id.* Of course, a legislature might, if it wishes, bestow upon a party a contractual right. But, given the presumption to the contrary, a legislature, must do so in "unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982)).

The Court need not review the law on this issue further to conclude that the 1965 Act did not vest in the plaintiffs a contractual right to preferential renewal. Section 20d of the 1965 Act stated:

> The Secretary shall encourage the continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiations of new contracts of permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d. This provision is egregiously short of conveying in "unmistakable terms" a contractual right to the plaintiffs. First, the provision is wholly bereft of even the most standard contractual language. For instance, there is no clause which notes that the renewal preference is "in consideration of" any act of the concessioners.

Second, the terms of the Act actually belie a contractual interpretation. By its terms, the Act orders the Secretary of Interior to "giv[e]" renewal preferences to the concessioners; it does not order the Secretary to contract with the concessioners for the renewal right. This observation is important, as elsewhere in the Act, the Secretary is explicitly authorized to *contract* for a preferential right of renewal in certain limited circumstances. *See* 16 U.S.C. § 20c. This suggests that, had Congress wished to create contractual renewal rights in concessioners like the plaintiffs, it would have provided such discretion to the Secretary. *See National Rifle Ass'n* v. *Reno*, 216 F.3d 122, 130-31 (D.C.Cir.2000) (where Congress includes particular language in one section of a statute, but omits it in another, the omission is presumed to be intentional). Congress's failure to do this forecloses any possibility that the 1965 Act bestowed contractual renewal rights on the plaintiffs.

(b) Implied Contracts

An implied-in-fact contract exists when parties "manifest their agreement ... by conduct" instead of words. John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS, § 1.11, at 21 (4th ed.1998). As the Supreme Court has ex-

plained, the "meeting of minds" in an implied-in-fact contract is inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 424 (1996) (citation omitted).

Common examples include contracts for goods formed by a raised hand at an auction, or contracts for services formed by calling a repairman to your house. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b In each case, the *facts* of the situation make clear that the parties wish to be bound in contract, even without an explicit offer and acceptance.

To demonstrate an implied-in-fact contract, a party must show "(1) mutuality of intent to contract, (2) consideration, (3) unambiguous offer and acceptance, and (4) that the representative whose conduct is relied upon had actual authority to bind the government." See *City of Cincinnati* v. *United States*, 153 F.3d 1375, 1377 (Fed.Cir.1998); *Hoffmann* v. *U.S.*, 53 F. Supp. 2d 483, 488 (D.D.C.1999).

Based on this explanation of law and the administrative records filed in these cases, the Court finds that the plaintiffs do not have a preferential right to renewal derived from an implied contract. The Court finds nothing in the administrative record suggesting that the NPS and the plaintiffs entered into a contract through mere conduct. Nor, for that matter, have the plaintiffs provided a single citation to the record on this issue. Although the plaintiffs repeatedly refer to numerous declarations of individuals who deem the contractual right to exist; none of these declarations are part of the administrative record, and there is no compelling reason for the Court to look beyond the record and consider them. *See Esch* v. *Yeutter*, 876 F.2d 976, 991-92 (D.C.Cir.1989) (summarizing the instances where a court may look beyond the administrative record in evaluating agency action). The Court thus finds that no implied contract for preferential renewal exists.

(c) Implied Terms in Contracts

In the field of contract law, courts generally assume that "every person is ... capable of managing his own affairs." 11 Lord, WILLISTON ON CONTRACTS, § 31.5, at 298 (4th ed.1999). Nonetheless, in a small number of circumstances, courts have been willing to add — or imply — terms into written and fully integrated contracts. As summarized by one federal court:

> Implied covenants are disfavored. Only two circumstances are held to warrant implication of a covenant: (1) the parties thought it so obvious it did not need stating or (2) it is a necessary result of what is stated, either as an implication of the language used or it is indispensable to effectuate the intention of the parties.

In re KDT Industries, Inc., 30 B.R. 252, 254 (S.D.N.Y.1983); see also 11 LORD, WILLISTON ON CONTRACTS, § 31.7, at 317-23 (4th ed.1999) (summarizing case-law on implied contract terms).

Often times, the terms sought to be implied are statutes in existence at the time the contract was formed. In considering this proposition, the U.S. Supreme Court concluded that a state law should be implied as a contract term only if the term is "so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 188-89 (1992) (emphasis added); *see also Sacramento Navigation Co.* v. *Salz*, 273 U.S. 326, 329 (1927) ("A contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intentions of the parties and arise from the language of the contract and the circumstances under which it was made.").

A short example illustrates the intuitive nature of this doctrine. The case involved a contract between the United States government and a refrigerator contractor. *See City of New York* v. *U.S.*, 125 Ct.Cl. 576, 113 F. Supp. 645 (1953). The government leased a certain quantity of "cooler" space at a rate of $1.00 per square foot, and another quantity of "freezer" space at a rate of $1.50 per square foot. After the parties agreed on a total price of $270,000, the government sought additional "freezer" space in place of its "cooler" space. However, the government refused to pay any extra price, arguing instead that the terms of the lease provided the government with the option of switching between cooler and freezer space, but did not provide for an adjustment in contract price. *Id.* at 646. The court disagreed, and found it patently obvious that a change in refrigerator space would necessitate a change in the total price. The court then supplied the contract with such a clause based on what was undoubtedly "intended at the time of the execution of the [contract]." *Id.* at 647.

In light of the foregoing law, the Court finds that a preferential right of renewal is not an implied term in the plaintiffs' current concession contracts. First, it can hardly be said that the preferential right of renewal was "so obvious[ly] [a part of the contract that] it did not need stating." The preferential renewal term is a significant contract term, one that would clearly be a large component of the bargained-for exchange. It is not a routine term, and it is certainly not the type of term that sophisticated parties such as the NPS and the plaintiffs would consider "so obvious" as to leave unwritten. The administrative record provides no indication that the parties had the mutual understanding that the contract contained the renewal term.

Second, nothing in administrative record suggests that the renewal term is "indispensable to effectuate the intention of the parties." As just stated above, the administrative is wholly devoid of information suggesting that the NPS *in-*

tended the renewal term to be part of the contract. Moreover, the contract is not rendered senseless or ineffectual without the renewal term. To the contrary, the contract has sufficed for the past 30 years, and is such that the plaintiffs seek to re-enter it once again. Thus, the Court finds that the preferential right of renewal is not an implied term in the plaintiffs' concession contracts.

* * * * * *

Thus, finding that the plaintiffs do not have a contractual right of renewal, the Court finds that the NPS's regulations and prospectuses are a reasonable interpretation of applicable law on this issue. The Court now turns to a related issue: whether the NPS's regulations are unlawful with respect to concessioners that have a statutory right of preferential renewal.

D. The Statutory Right of Preferential Renewal

In the preceding section, the Court held that the plaintiffs do not have a contractual right of preferential renewal. This does not end the renewal issue, however. The 1998 Act explicitly grants a preferential renewal right to concessioners with gross receipts of less than $500,000 annually, and to outfitting and guide concessioners. *See* 16 U.S.C. § 5952(7)(B). Although Amfac, Aramark, and Hamilton Stores do not fall within these parameters, many members of the National Park Hospitality Association ("NPHA") do. Thus, because the NPHA has associational standing in this respect, the Court now considers whether the NPS regulations which implement concessioners' statutory right of preferential renewal are contrary to law. The NPHA makes six arguments as to the regulations' unlawfulness.

1. Matching the Terms of the Best Offer

The NPHA complains that NPS regulations require incumbent concessioners wishing to exercise their preferential right of renewal to not just match the best proposal, but to

submit a *better* proposal. More specifically, the NPHA argues that incumbent concessioners are given the opportunity to match the "better terms and conditions of the best proposal," but are not permitted to also adopt the weaker terms of the best proposal. 36 C .F.R. § 51.32. In this respect, the final proposal of the incumbent concessioner would contain better terms and conditions than any other proposal.

The defendants argue that this is not true, and that the incumbent concessioner is indeed "entitled to match the terms and conditions, both more favorable and less favorable than what the incumbent offered, of the best proposal." Brief for Defendants, Apr. 9, 2001, at 32. Thus, the defendants assert that "[t]here is simply no dispute here for the Court to resolve." *Id.* The Court agrees, and declines to opine in the absence of a case or controversy. Nonetheless, the Court notes that the defendants' statement in their brief is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation* v. *Henney*, 202 F.3d 331, 336 (D.C.Cir.2000).

2. Incumbent Concessioners' Duty to Bid

The NPHA also contests the legitimacy of 36 C.F.R. § 51.35. This section states:

> If the Director receives no responsive proposals, including a responsive proposal from a preferred offeror, in response to a prospectus for a qualified concession contract for which a preferred offeror exists, the Director must cancel the solicitation and may resolicit the concession contract or take other appropriate action in accordance with this part. No right of preference will apply to a concession contract resolicited under this section unless the contract is resolicited upon terms and conditions materially more favorable to offerors than those contained in the original contract.

36 C.F.R. § 51.35. NPHA argues that this regulation is an unlawful interpretation of section 403(4)(C) of the 1998 Act. That section reads:

> If all proposals submitted to the Secretary either fail to meet the minimum requirements or are rejected by the Secretary, the Secretary shall establish new minimum contract requirements and re-initiate the competitive selection process pursuant to this section.

16 U.S.C. § 5952(4)(C).

The gravamen of the disputed regulation lies in the incentives it creates for concessioners with statutory preferences in renewal. When a prospectus is issued and no bids are received (even one from the incumbent concessioner), the NPS, in an effort to obtain bidders, reissues the prospectus on terms that are more favorable to the concessioners. The problem with this, according to the NPS, is that a "no-bid" situation can occur for two different reasons. First, it might be that the prospectus was so poorly drawn that no entity is interested in being a concessioner under such terms. Or second, it might be that the terms are fair, but that no bidder wishes to spend the resources bidding with the expectation that the incumbent concessioner will likely obtain the contract in the end. If the second situation is the reason that no bids are received, then the NPS will end up re-drafting the prospectus with more favorable terms, even though the incumbent concessioner might be willing to accept the contract on the original terms. Thus, in many cases, an incumbent concessioner is able to attain better terms just by withholding its own bid.

The NPS regulation seeks to combat this disincentive for incumbent concessioners to bid. When a prospectus is reissued for the first reason — that is, the terms are unappealing for all bidders — then an incumbent concessioner would retain its preferential right of renewal. An original prospectus

is considered unappealing for all bidders when the new prospectus contains terms which are "materially more favorable" to concessioners. If, however, a prospectus is reissued for the second reason — an incumbent concessioner is willing to accept the contract but is holding out for more favorable terms — the incumbent concessioner forfeits its preferential right of renewal. Thus, under 36 C.F.R. § 51.35, an incumbent concessioner's clear incentive is to bid on every prospectus it is willing to accept.

The question before the Court is therefore whether Congress, in enacting the 1998 Act, "directly spoke[ ] to [this] issue," and if not, whether the "agency's [regulation] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 841. The Court finds that Congress, by the text of the 1998 Act, has foreclosed the NPS's discretion on this issue. The statute clearly mandates what the NPS must do in a no-bid situation; it must "re-initiate the competitive selection process pursuant to [section 5952]." 16 U.S.C. § 5952(4)(C). Section 5952 provides a statutory right of preferential renewal to certain concessioners, and in no way makes this right contingent upon submitting a bid. The NPS's sole argument on this issue stands on the wisdom of its regulation, and completely overlooks the fact that Congress, in its own wisdom the Court must assume, has already addressed the issue. The Court therefore sets aside section 51.35 and any provision of the NPS's regulations to the extent a preferential right of renewal is made contingent upon factors not enumerated in 16 U.S.C. § 5952.

3. The Timing of the Determination of a Concessioner's Preferential Right of Renewal

The NPHA argues that the NPS is obligated to finally establish a concessioner's status as a preferred concessioner before the concessioner is obligated to bid on a prospectus. By delaying the final determination, argues the NPHA, the NPS is forcing concessioners to submit their own proposals

when they would otherwise wait and simply match the best proposal.[11] In this way, a concessioner enjoying a preferential right of renewal may nonetheless end up submitting a more aggressive proposal than a competitor.

The 1998 Act commands the NPS include in each prospectus "a description of a preferential right of renewal ... held by an existing concessioner." 16 U.S.C. § 5952(3)(H). In accordance with this, the NPS regulations require the NPS Director to determine whether a concessioner is a preferred offeror "no later than the date of issuance of a prospectus for the applicable new concession contract." 36 C.F.R. § 51.28. The Court fails to see any conflict between the NPS's regulation and the 1998 Act, and therefore declines to strike any regulatory provision on this issue.

4. The Intra-Agency Appeals Process

The plaintiffs allege a Fifth Amendment Due Process violation in the manner in which the NPS designates the person who adjudicates appeals. According to the NPHA, the NPS regulations provide that the Director of the NPS will not only make the initial determination on right of preference issues, but will also preside over the appeal of that decision. *See* Brief for Plaintiffs, Feb. 28, 2001, at 42.

In their brief, the defendants clarify that the initial determination whether an incumbent concessioner is entitled to a preferential right of renewal and the final determination on appeal will be handled by separate people. *See* Brief for Defendants, Apr. 9, 2001, at 35-36. Seeing that the dispute has

---

[11] Although each prospectus identifies the preferred offeror for that concessions contract, a concessioner's preferred status, or lack thereof, is not final until an administrative appeal is exhausted. Because the NPS does not permit parties to pursue appeals until the bidding is complete, a preferred concessioner that is not so-labeled in the prospectus is forced to bid on a contract it would otherwise decline to bid on.

been obviated by the defendants' clarification, the Court will not opine on the matter except to note that the defendants' position is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

5. The Requirement of a Stay Pending Intra-Agency Appeal

The NPHA argues that the defendants' rules on intra-agency appeal violate section 10(c) of the Administrative Procedure Act. That section provides for judicial review of final agency decisions, unless the agency provides "for an appeal to a superior agency authority," and meanwhile renders the disputed decision "inoperative." 5 U.S.C. § 704. The gist of the NPHA's argument is that a decision denying a concessioner a preferential right of renewal is not rendered "inoperative" unless the bidding process on that contract is stayed pending the resolution of the appeal. If the process is not stayed, then an erroneous decision by the initial decisionmaker will affect the bidding process, since "[b]ids by both incumbent and non-incumbent concessioners will, of course, vary based on whether the incumbent has a right to match the best proposal." *See* Brief for Plaintiffs, Feb. 28, 2001, at 44 n.8.

The Court disagrees that the NPS is in violation of Section 10(c). The core impact of a decision on a concessioner's preferential right of renewal is whether that concessioner will be permitted to match the best proposal. Thus, to render an initial decision on this issue "inoperative," the agency must see to it that the preferential right may still be exercised if finally determined to exist. The defendants have done this. Although the initial preferential right decision may exert certain collateral affects while pending appeal, it is a far stretch to say that the decision is therefore "operative." If that were the case, then a great majority (if not all) agency decisions

would remain operative pending appeal, because every decision has collateral effects well beyond the issue underlying the decision. For example, an initial agency decision will often serve as an impetus for parties to retain counsel or alter their travel plans. It cannot be said, however, that the decision is therefore "operating" on the parties prior to the appellate decision. The Court therefore finds that, because the central issue of a preferential right determination is rendered inoperative, the defendants are not in violation of section 10(c) of the APA.

6. The Information Used in the Determination of a Preferential Right of Renewal

The plaintiffs argue that the defendants plan to employ an "impermissibly vague" set of factors to determine whether a concessioner has performed satisfactorily during its contract, and is therefore entitled to a preference in renewal. *See* Brief for Plaintiffs, Feb. 28, 2001, at 44. Although the NPS usually makes this decision based on concessioners' annual evaluations, NPS regulations also permit the NPS to view "other relevant facts and circumstances." 36 C.F.R. § 51.44.

The defendants explain that this provision is not a license to investigate concessioners and hide the evidence from them until the time for renewal. Rather, it is a way of ensuring that, if it is determined after the fact that a concessioner's performance was actually less than satisfactory in a given year, the NPS can use that information in its consideration of whether, the concessioner's performance, on the whole, was indeed satisfactory.[12]

Therefore, with the understanding that the "other relevant facts and circumstances" that will be used by the defendants

---

[12] The defendants explain that "there may be occasions when the NPS becomes aware of actions of a concessioner that may result in a determination of less than satisfactory performance that were not revealed in the annual evaluation." 65 Fed. Reg. at 20645.

in addition to the annual evaluations are only facts and circumstances "previously withheld from the NPS," there appears to be no dispute for the Court to resolve. Of course, as explained previously herein, the defendants' explanation in their brief is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

* * * * * *

With the NPHA's objections to the defendants' regulations on concessioners' statutory right of preferential renewal resolved, the Court now turns to the next of the plaintiffs' arguments.

E. The Illusory Contract Issue

The plaintiffs next argue that two provisions in the NPS's proposed concession contract render the contract impermissibly ambiguous and illusory. The disputed provisions permit the NPS to impose additional duties on the concessioners during the life of the contract, and to terminate the contract at any time. See Standard Concessions Contract, 65 Fed. Reg. 26052. The Court disagrees and finds the NPS's standard concession contract acceptable under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

1. The "Additional Duties" Provision

Section 5(a) of the NPS's standard concession contract requires the concessioner to "comply with all Applicable Laws in fulfilling its obligations under [the] CONTRACT at the Concessioner's sole cost and expense." 65 Fed. Reg. 26065. Section 2(a) of the contract defines "applicable laws" as "the laws of Congress governing the [park], including, but not limited to, the rules, regulations, requirements and policies promulgated under those laws, ... whether now in force or amended, enacted or promulgated in the future." 65 Fed. Reg. 26063.

This is a standard provision for these types of contracts, and has been "standard in NPS concession contracts for many years," including the ones currently held by the plaintiffs. 65 Fed. Reg. 26053. The plaintiffs nonetheless argue the NPS's right to impose additional duties on the concessioners renders the contract (1) impermissibly ambiguous, (2) illusory, and (3) contrary to section 407(a) of the 1998 Act. The Court disagrees on all three counts.

First, the court accepts the general notion that ambiguous bid solicitations are generally disfavored. *See International Ass'n of Firefighters* v. *United States Dep't of Navy*, 536 F. Supp. 1254, 1269 (D.R.I.1982). The Court, however, fails to find the solicitation ambiguous because the contested provisions are not capable of more than one interpretation. To the contrary, the provisions state quite clearly the conditions under which the concessioners' duties will change. The mere fact that the exact parameters of those duties are not known at the time of contracting does not somehow render the contract ambiguous. If that were the case, then all contracts would be ambiguous, since all parties to a contract must continually modify their performance to remain in accordance with changing laws.

Second, the Court fails to find any way in which these provisions make the contract illusory. An illusory contract is one in which one party "gives consideration that is so insignificant that an actual obligation cannot be imposed." *Woll* v. *United States*, 45 Fed. Cl. 475 (1999). The standard concession contract imposes a host of duties on the NPS, and the mere existence of the disputed provisions does not render the duties optional. Of course, in the unlikely event that the NPS were to pass so many regulations as to make all of its contractual duties optional, the plaintiffs might have a case. But that has not happened, and therefore, the contract as it currently stands is not illusory on account of these provisions.

Third, the Court finds that the contested provisions are not contrary to section 407(a) of the 1998 Act. This provision states:

> A concession contract shall provide for payment to the government of a franchise fee or such other monetary compensation as determined by the secretary upon consideration of the probable value to the concessioner [which] shall be based on a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract.

The plaintiffs argue that, since the exact scope of concessioners' future duties is not known, and the 1998 Act only permits the franchise fee to be modified for "extraordinary and unanticipated" reasons, there is no way to ensure that the plaintiffs will maintain a "reasonable opportunity for net profit." That is, as a change in future duties could increase costs without simultaneously lowering the franchise fee, the provision permitting the imposition of additional duties is at odds with the opportunity to maintain a reasonable profit margin. Although the addition of future duties may increase costs, the plaintiffs are mistaken that the mere possibility of this is enough to make the current concession contract facially violative of the 1998 Act. There is no reason to believe that, these disputed provisions, by their very inclusion in the contract, *completely foreclose* the possibility that a concessioner could make a reasonable profit. It is quite possible, for example, that the NPS will factor the possibility of additional duties into the initial franchise fee. On the other hand, if such measures are not taken, and an additional duty imposed in the future does impair a concessioner's opportunity for reasonable profit, the concessioner's remedy is to bring a *Chevron*-based challenge against the new regulations. But for now, the plaintiffs' challenge must fail, as a claim based on the mere possibility of a future claim is not a claim at all.

2. The Unilateral Termination Provision

The standard concession contract issued by the NPS gives the NPS the right to "terminate [the] CONTRACT at any time in order to protect [park] visitors, protect, conserve and preserve [park] resources, or to limit visitor services in the [park] to those that continue to be necessary and appropriate." STANDARD CONCESSION CONTRACT, § 16(b)(1); 65 Fed. Reg. 26072. The plaintiffs argue that this gives the NPS the right to "cancel at [its] pleasure." Brief for Plaintiffs, Feb. 28, 2001, at 26.

The Court disagrees. The contract explicitly hinges the NPS's capacity to terminate on the necessity and appropriateness of the action. While the Court concedes that these terms do not have a precise meaning, it does not therefore follow that they have no meaning at all. Clearly, under the standard concession contract, the NPS cannot terminate the contract at its pleasure.

F. The Applicability of the Contract Disputes Act

One of the NPS's regulations implementing the 1998 Act declares that

> [c]oncession contracts are not contracts within the meaning of 41 U.S.C. § 601 et seq. (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

65 Fed. Reg. 20632, 20634. The plaintiffs argue that this regulation is contrary to law because the Contract Disputes Act ("CDA") is applicable to concession contracts and the NPS has no authority to circumscribe the applicability of the CDA. The Court finds that the CDA does not apply to concession contracts, and therefore that the disputed regulation is permissible.

The proper place to begin is with the text of the CDA. By its text, the Act applies to

> any express or implied contract ... entered into by an executive agency for —
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a). The Court is thus faced with the question whether a concession contract is one of these enumerated contracts. Preliminarily, it is fair to narrow the list down to contracts (2) and (3). There is little argument that concession contracts are contracts for the procurement or disposal of personal property. The plaintiffs do not argue to the contrary.

The Court first finds that the CDA is ambiguous with respect to whether concession contracts are contracts listed in section 602(a)(2)-(3). On one hand, the government is receiving services; it is contracting for the provision of amenities to the visitors of its national parks. Moreover, because the concession contracts contain various terms relating to the stewardship of concession areas, *see* STANDARD CONCESSION CONTRACT, § 6(g), 9(a), 9(d), 10(a), 65 Fed Reg. at 26067-26068, it can be said that the government is also bargaining for the maintenance of real property. On the other hand, the basic nature of concession contracts differs markedly from that of typical procurement contracts; in concession contracts, the government is not attempting to procure chattel or services for itself, but is rather permitting another to use its land, as in a leasor/leasee relationship. In addition, when the

government procures something, it usually assumes the role of payor, not payee as in this case.

Given this ambiguity, the Court is next charged with determining whether the NPS regulation is a reasonable interpretation of the section 602 of the CDA. *See Chevron*, 467 U.S. at 841. The Court finds that it is. First and foremost in support of this conclusion is the Congressional statement that concession contracts are contracts "to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to units of the national park system." 16 U.S.C. § 5952. Thus, Congress sees concession contracts as authorization contracts, not procurement contracts. This view is further supported by the fact that, when Congress defined a concession contract as such in 1998, the prevailing understanding was that concession contracts were not procurement contracts. This understanding is evidenced in two significant ways. First, NPS regulations implementing the 1965 Act expressly state that concession contracts "are not Federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to Federal procurement actions." 36 C.F.R. 51.1. Second, the Court of Federal Claims decided in 1993 that concession contracts "did not constitute a procurement," because the NPS is not paying funds, but "collecting fees in exchange for granting a permit to operate a concession business." *YRT Services Corporation* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993). Given that this was the prevailing understanding of concession contracts in 1998, it is presumed that Congress was aware of and therefore adopted this view by enacting the 1998 Act without changing it.[13] *See Lorillard* v.

---

[13] It is worth noting that, while legislative history is far from a definitive indicator, a Senate report on the 1998 Act does speak to this issue. According to the report, "the policies and procedures of this title as implemented by the Secretary's regulations are governing requirements for concession contracts and that such contracts do not constitute contracts for the procurement of goods and ser-

Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change ..."); *see also Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993).

In light of this understanding of the 1998 Act, the Court is confident that the NPS's classification of concession contracts is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 841. In arguing to the contrary, the plaintiffs cite certain cases where various non-Article III tribunals have found to the contrary. *See* Brief for Plaintiffs, Feb. 28, 2001, at 30-34 (citing, *e.g.*, *In re R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at *58 (1989)). For the most part, these cases all pre-date the passage of the 1998 Act. And since the 1998 affirmed the "authorization" model of concession contracts, these cases can be considered rejected by the 1998 Act. Although one case, *Appeal of Watch Hill Concessions, Inc.*, IBCA 4284/2000, was decided after 1998, the Court is not bound in any way by that tribunal's decision. Moreover, the mere fact that another interpretation exists does not render the NPS's interpretation incorrect, because the NPS interpretation "need not be the only or most reasonable interpretation." *See Chevron*, 467 U.S. at 843 n.11. Rather, it need only be "rational and consistent with the statute," which the Court finds it to be. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987).

G. The Bid Evaluation Issue

The plaintiffs argue that the NPS's method of selecting the winning bid for each concession contract impermissibly varies from the mandates of the 1998 Act. The Court disagrees.

---

vices for the benefit of the Government or otherwise." S. Rep. 105-202, 105th Cong., 2d Sess . at 39 (June 5, 1998).

The 1998 Act states the following with respect to bid selection:

> (A) In selecting the best proposal, the Secretary shall consider the following principal factors:
>
> > (i) The responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.
> >
> > (ii) The experience and related background of the person, corporation, or entity submitting the proposal ...
> >
> > (iii)The financial capability of the person, corporation, or entity submitting the proposal.
> >
> > (iv) The proposed franchise fee....

16 U.S.C. § 5952. The 1998 Act also permits the Secretary to "consider such secondary factors as the Secretary deems appropriate ." 16 U.S.C. § 5952(5)(B). With regard to the weight accorded to each factor, the Act orders the NPS to weigh the proposed franchise fee less than the factors listed in (i). *See* § 5952(5)(A)(iv). Other than this, however, the 1998 Act does not specify how these factors shall be weighed.

In implementing this statute, the NPS promulgated the following regulation:

> (a) The five principal selection factors are:
> > (1) The responsiveness of the proposal to the objectives, as described in the prospectus, of protecting, conserving, and preserving resources of the park area;

(2) The responsiveness of the proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates;

(3) The experience and related background of the offeror, including the past performance and expertise of the offeror in providing the same or similar visitor services as those to be provided under the concession contract;

(4) The financial capability of the offeror to carry out its proposal; and

(5) The amount of the proposed minimum franchise fee, if any, and/or other forms of financial consideration to the Director. However, consideration of revenue to the United States will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.

16 C.F.R. § 51.17. In accounting for each of these factors, the NPS utilizes a point system: an applicant can earn from 0 to 5 points for each of the first four factors, and can earn from 0 to 4 points on the franchise fee factor. For certain types of contracts, the NPS considers two additional, or "secondary", selection factors and awards them between 0 and 3 points:

(b) The secondary selection factors are:

(1) The quality of the offeror's proposal to conduct its operations in a manner that furthers the protection, conservation and preservation of park area and other resources through environmental management programs and activities, including, without limitation,

energy conservation, waste reduction, and recycling ...; and

(2) Any other selection factors the Director may adopt in furtherance of the purposes of this part, including where appropriate and otherwise permitted by law, the extent to which a proposal calls for the employment of Indians (including Native Alaskans) and/or involvement of businesses owned by Indians, Indian tribes, Native Alaskans, or minority or women-owned businesses in operations under the proposed concession contract.

36 C.F.R. § 51.17(b).

The plaintiffs argue that the NPS's regulations are arbitrary and capricious because they "dramatically alter the weights of the selection criteria from those that Congress saw fit to assign." Brief for Plaintiffs, Feb. 28, 2001, at 36. According to the plaintiffs' reading of the 1998 Act, Congress intended to "establish three co-equal factors ... as well as a fourth subordinate factor." *Id.*

The Court finds that, with regard to the total number of factors to be considered, and the weight to be attributed to each one, Congress has not "directly spoken to the issue." *Chevron*, 467 U.S. at 841. The Court further finds that the disputed provisions are "based on a permissible construction of the statute." *Id.* With regard to the total number of factors considered, there is little argument that Congress meant to narrow the selection process to *only* the four enumerated factors. First and most obviously, the statute fails to use the word "only," which would be the most expedient and direct way to limit the evaluation criteria. Second, the statute explicitly contemplates the consideration of supplemental factors which the "Secretary deems appropriate." 16 U.S.C. § 5952(5)(B). Thus, there is very little reason to think that Congress' four-factor list is meant to be wholly exhaustive.

With regard to the weight to be applied to the various factors, the 1998 Act only addresses the weighing of one factor: the franchise fee is to be weighed less than the first statutory factor. The Act is conspicuously silent on all other weighing issues, and this silence must be interpreted to permit the NPS to weigh the remaining factors as it sees fit. *See National Rifle Ass'n*, 216 F.3d at 130-31 (where Congress includes particular language in one section of a statute, but omits it in another, the omission is presumed to be intentional). Of course, the NPS could weigh some factors so heavily, and others . . lightly, that the weighing system effectively eliminates one factor from consideration. If this were the case, it would be a violation of the NPS's duty to weigh all the factors. *See Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Texas Oil & Gas Ass'n* v. *U.S. EPA*, 161 F.3d 923, 934 (5th Cir.1998) ("Although the EPA has significant discretion in deciding how much weight to accord each statutory factor under the [Clean Water Act], it is not free to ignore any individual factor entirely." (citations omitted)). But the current point system does no such thing; the franchise fee is still being weighed and is not being minimized to the extent of de facto exclusion.

Thus, the Court concludes that the NPS's system of selecting the winning bid for concession contracts is "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *see also General Elec. Co.* v. *United States Envtl. Protection Agency*, 53 F.3d 1324, 1327 (D.C.Cir.1995).

H. Leasehold Surrender Interests

The plaintiffs claim that the defendants' regulations deprive them of leasehold surrender interests granted to them by the 1998 Act. Generally speaking, a leasehold surrender interest is a leasee's monetary interest in the improvements he makes to property during his lease. When the lease is

terminated, the leasee may then recoup the approximate value of his improvement. In 1998, Congress decided that concessioners, who often build extensive facilities on national park grounds, should be entitled to the value of certain improvements made on park property. Congress therefore granted each concessioner a "leasehold surrender interest in each capital improvement constructed by [the] concessioner." 16 U.S.C. § 5954(a)(1). "Capital improvement" is defined by the 1998 Act as "a structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U .S.C. § 5954(e)(2).

The plaintiffs take issue with 36 C.F.R. § 51.67, which states:

> A concessioner will not obtain initial or increased leasehold surrender interest as a result of repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation.

36 C.F.R. § 51.67. A "major rehabilitation" is in turn defined as a "planned comprehensive rehabilitation of an existing structure, ... [t]he construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure." 36 C.F.R. § 51.51. Finally, "pre-rehabilitation value" is defined as "the replacement cost of the structure less depreciation." *Id.* The plaintiffs argue that this regulation is contrary to the 1998 Act because the 1998 Act grants a leasehold surrender interest in "each capital improvement," not just the ones costing more than half a facility's existing value. For example, the plaintiffs argue that replacing a brick fireplace in the historic El Tovar Hotel at the Grand Canyon is clearly a capital improvement, and should give rise to a leasehold interest, even though the project's cost is nowhere near half the value of the hotel. Without expressing any opinion on the plaintiffs' example, the Court disagrees with the plaintiffs' reasoning.

Paramount to the plaintiffs' argument is their understanding of a capital improvement. They argue that the "plain meaning" of statutory language should control, and that the plain meaning of "capital improvement" is an "expenditure[ ] that add[s] to the value of an asset or materially prolongs its economic life." *See* Brief for Plaintiffs, Feb. 28, 2001, at 5. The plaintiffs falter, however, in that the 1998 Act explicitly defines capital improvement, thus rendering any colloquial definition irrelevant. "Capital improvement" is explicitly defined as "a structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U.S.C. § 5954(e)(2). Nothing in the disputed regulation withholds a leasehold surrender interest from a concessioner who makes a capital improvement.[14] Rather, the regulation only addresses the "repair and maintenance" of concession facilities. Moreover, because there is nothing in the 1998 Act that gives rise to a leasehold surren-

[14] The Court does note that the defendants define the word "structure", "fixture", and "nonremoveable equipment" in the regulations. *See* 36 C.F.R. § 51.51. Thus, it might be argued that an especially narrow regulatory definition of "structure", for example, could preclude a concessioner from obtaining a leasehold interest. The plaintiffs address this issue for the first time in their reply brief, and make the argument that, according to Oxford American Dictionary, "structure" refers not only to "buildings" but also "parts of buildings." See Brief for Plaintiffs, April 30, 2001, at 9. If this is true, then the word structure, being susceptible to more than one definition, is ambiguous. *See Securities Indus. Ass'n* v. *Board of Governors of Fed. Reserve Sys.*, 847 F.2d 890, (D.C.Cir.1988) (referring to a dictionary to determine whether a word is susceptible to more than one meaning, and therefore ambiguous). The ambiguity in turn requires this Court to defer to an agency's reasonable interpretation. In the case at hand, the agency's definition encapsulates a standard definition of structure and is therefore eminently reasonable. The defendants' definitions of fixture and nonremoveable equipment, which the plaintiffs do not challenge, likewise raise no concerns of unreasonableness.

der interest for repair and maintenance, the plaintiffs are actually better off with the regulation in place. Under the current regulations, the plaintiffs will be able to obtain a leasehold surrender interest for major rehabilitations that are not otherwise classified as capital improvements.

The Court therefore finds that the defendants' regulation concerning leasehold surrender interests for the repair and maintenance of concession facilities, 36 C.F.R. § 51.67, is permissible.

I. The Repair and Maintenance Reserve

The plaintiffs argue that the defendants' regulation requiring concessioners to contribute funds into a repair and maintenance fund violates the 1998 Act. Specifically, the plaintiffs claim that, since the fund proceeds are used for capital improvements, concessioners should have a leasehold surrender interest for the amount of money contributed to the fund.

In order to obtain a concession contract, concessioners must agree to "establish and manage a Repair and Maintenance Reserve, [the funds of which] shall be used to carry out ... [nonroutine] repair and maintenance of Concession Facilities." Standard Concession Contract, § 10(c); 65 Fed. Reg. 26069. According to the standard contract, the fund is designated for projects that are "non-recurring within a seven-year time frame," such as:

> repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects.

Id. The contract further states that monies from this fund "shall not be used for a major rehabilitation" and that the concessioner shall "obtain no ... Leasehold Surrender Interest

... as a consequence of the expenditure of Repair and Maintenance Reserve Funds." *Id.*

In light of these regulatory provisions, as well as the provisions of the 1998 Act which guarantee concessioners a leasehold surrender interest for "capital improvements," the Court must determine whether the uses of the Repair and Maintenance Reserve are capital improvements. If they are, then the plaintiffs are due a leasehold surrender interest and the defendants' standard contract and regulations are unlawful. If the Reserve funds are not used for capital improvements within the meaning of the 1998 Act, then the disputed regulations are clearly acceptable.

To a large extent, the Court can only partially answer this question. This is because the list of enumerated uses for the Reserve funds is clearly not exhaustive, and even if it were, the uses are described so generally that it is impossible to categorize a use into a single category. For instance, the "rehabilitation" of a heating system may include the installation of a furnace, which likely is a capital improvement. On the other hand, a "rehabilitation" might only involve a draining of a building's radiators, which is not likely a capital improvement. Thus, although the denial of a leasehold surrender interest may be unlawful in some circumstances (*i.e.* in cases where the maintenance amounts to a capital improvement), the Court cannot say that the regulation, on its face, will be unlawful in its every application. Thus, this challenge to the regulation must fail. However, if in the future the plaintiffs can show that they were forced to expend Reserve funds on a project amounting to a capital improvement, they might have a viable claim that the Secretary acted arbitrarily and capriciously in disbursing Reserve funds. Until then, however, the regulation stands unaltered.[15]

[15] The Court also rejects the plaintiffs' argument that the Repair and Maintenance Reserve violates section 407 of the 1998 Act, 16 U.S.C. § 5952, by "divert[ing] concessioner revenues away from the purposes specified by [the 1998 Act]." Brief for Plaintiffs, Feb. 28, 2001, at 9. Section 407 of the 1998 Act deals with the accounting and expenditure of franchise fees paid by concessioners. These fees are computed "based upon a [concessioner's] reasonable opportunity for net profit in relation to the capital invested and the obligations of the contract." 16 U.S.C. § 5956(a). Thus, because the Repair and Maintenance Reserve is an "obligation[ ] of the contract," franchise fees are not "diverted" from the purposes specified in section 407. If they were, then every obligation in the contract which differed from the purposes of section 407 would be an improper "diverting" of funds.

J. The Definition of Construction Costs

The plaintiffs argue that the defendants' regulatory definition of the statutory term "construction costs" is unreasonable.

In defining the scope of concessioners' leasehold surrender interests, the 1998 Act provides that "[t]he value of a leasehold surrender interest in a capital improvement shall be an amount [derived from the] construction cost of the capital improvement." 16 U.S.C. § 5954(a)(3). Under the formula provided in the Act, the greater the construction costs, the great a concessioner's leasehold surrender interest. *Id.* The defendants define "construction costs" as "the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement." 36 C.F.R. § 51.51 "Eligible direct costs" are in turn defined as costs that are "necessary both for the construction of a capital improvement and are typically elements of a construction contract." *Id.* Finally, "eligible indirect costs" are "all other incurred capitalized costs ... necessary for the construction of a capital improvement." *Id.* Likely examples of eligible indirect costs are "architectural and engineering fees for plans", "environmental studies", "risk insurance", and "fees or service charges and interest on construction loans." *Id.*

The plaintiffs argue that the defendants' definition of "construction costs" is unreasonable because it fails to "encompass[ ] administrative expenses, such as legal fees related to capital improvements." Brief for Plaintiffs, Feb. 28, 2001, at 13. The Court squarely disagrees. First, the Court finds that the term "construction cost" is not self-defining; *i.e.*, it is "silent or ambiguous" with respect to the myriad of separate costs, such as legal fees, that emanate from a major construction project. *Chevron*, 467 U.S. at 841. Given this ambiguity, the Court next finds that the defendants' definition of the term is reasonable. The definition encompasses a broad variety of expenses involved in construction, and explicitly relies on professional resources such as the "Dictionary of Architecture and Construction." *See* 65 Fed. Reg. 20650. Of course, some expenses that relate to construction are excluded, but some lines must be drawn. Otherwise, "construction costs" will end up including expenses far flung from the construction of the building, such as sales and marketing costs. *See* Fed. Reg. 20650. But the Court need not find that such costs should not be included; indeed, it is beyond this Court's judicial role to make such a determination. Rather, the Court need only measure whether the defendants' interpretation is reasonable, which the Court finds it to be.

Also on the subject of construction costs, the plaintiffs object to the defendants' condition that individual construction costs "be no higher that those prevailing in the locality of the project." 36 C.F.R. § 51.51. The plaintiffs argue that this "prevailing rate" standard fails to account for concessioners' added costs of "regulatory compliance." *See* Brief for Plaintiffs, Feb. 28, 2001, at 13. This point, even if true, is of no consequence to this tribunal unless it renders the prevailing rate standard unreasonable. But it does not; the prevailing rate standard is an eminently reasonable interpretation of the ambiguous statutory term "construction costs."

K. The Leasehold Surrender Interest in Replaced Fixtures

The plaintiffs argue that the defendants' regulation dealing with a concessioner's leasehold surrender interest in replaced fixtures, 36 C.F.R. § 51.65, violates the 1998 Act.

The relevant regulation states:

> A concessioner that replaces an existing fixture in which the concessioner has a leasehold surrender interest with a new fixture will increase its leasehold surrender interest by the amount of the construction cost of the replacement fixture less the construction cost of the replaced fixture.

36 C.F.R. § 51.65. The plaintiffs argue that this regulation is contrary to 16 U.S.C. § 5954(a)(5), which states:

> Where a concessioner ... makes a capital improvement to an existing capital improvement in which the concessioner has a leasehold surrender interest, the cost of such additional capital improvement shall be added to the then current value of the concessioner's leasehold surrender interest.

16 U.S.C. § 5954(a)(5). Elsewhere in the 1998 Act, Congress defines a "capital improvement" as a "structure, fixture, or nonremoveable equipment." 16 U.S.C. § 5954(e)(2).

The decision on this issue hinges on whether Congress "directly spoke[ ] to the issue" of leasehold surrender interests when fixtures are replaced. *Chevron*, 467 U.S. at 841. For, if the Act is ambiguous in this regard, the regulation will stand as it is a reasonable way to account for leasehold surrender interests in the fixture-replacement context.[16] If the

---

[16] The reasonableness of regulation is demonstrated by considering the competing alternatives in the context of a simple example. If a hotel owner with a leasehold surrender interest in the hotel were to replace the hotel furnace once every five years for 15

Act is not ambiguous, however, the disputed regulation must fall, as it conflicts with the "unambiguously expressed intent of Congress." *Id.* at 841.

The Court finds that the 1998 Act is ambiguous with regard to the calculation of leasehold surrender interests for replaced fixtures. Section 5954(a)(5), the only section of the Act which *might* address fixture replacement, does not address the replacement of a fixture; it clearly *addresses* the addition of a fixture (or capital improvement) to an existing fixture (or capital improvement). For example, when a concessioner adds a new wing to part of a guest lodge, section 5954(a)(5) entitles him to increase his leasehold surrender interest by the cost of this addition. Likewise, if the concessioner were to, years later, add an air conditioning system to this addition, section 5954(a)(5) permits him to increase his leasehold surrender interest by the cost of the air conditioning system as well. Section 5954(a)(5)'s focus on *adding* capital improvements, as opposed to *replacing* capital improvements, is made clear by the text of the statute. First, the section limits its application to circumstances where concessioners "make[ ] a capital improvement to an existing capital improvement." This language is clearly language of addition, as it would be difficult make a capital improvement to something if that something was removed from the picture.

---

years, the plaintiffs' proposed accounting would be to increase the leasehold surrender interest three separate times by the cost of the furnace. Under this approach, the hotel owner would hold a leasehold surrender interest equal to four furnaces, even though the hotel would only contain one. The defendants' approach would be to increase the leasehold surrender interest by the cost of the new furnace, but also to decrease it by the cost of the replaced furnace. Under this approach, the hotel owner's leasehold surrender interest would reflect a single furnace at the price level of the final purchase. This latter approach is a logical and reasonable way of accounting for a concessioner's leasehold surrender interest when fixtures are replaced.

Second, the statute even uses the word "addition", as it provides that the cost of the "additional capital improvement shall be added to" the concessioner's leasehold surrender interest.

Despite this reading of the statute, it might still be argued (in a particularly tortuous way) that certain replacement fixtures are covered by the language of section 5954(a)(5). Using the example above, one could argue that, since the lodge's new wing is a "capital improvement" and the air conditioning system added to that wing is a "capital improvement", then, if the air conditioning system was later replaced with a new system, it could be said that this new system was not a "replacement", but simply an "addition" of a capital improvement (the air conditioning system) to an already-existing capital improvement (the new wing). This interpretation strains the statute to the point of breaking. It is wholly illogical to think that Congress sought to provide leasehold surrender interests for replacement fixtures in a new wing, but not in the original lodge.

Thus, because no provision of the 1998 Act speaks directly to the issue of leasehold surrender interests in replacement fixtures, and the defendants' regulation dealing with the issue is reasonable, the Court finds that the regulation is permissible.

L. Depreciation for Functional Obsolescence

The plaintiffs argue that the defendants' regulation on depreciation violates the clear language of 16 U.S.C. § 5954(a)(3). Specifically, the plaintiffs claim that section 5954(a)(3) orders assets to be depreciated only for "wear and tear", and not for "functional obsolescence" as well. *See* Brief for Plaintiffs, Feb. 28, 2001, at 19. Although the defendants' regulation mirrors section 5954(a)(3), *see* 36 C.F.R. § 51.51, the plaintiffs claim that the defendants intend to include functional obsolescence in its regulation as a matter of practice. In their brief, the defendants respond by as-

suring the plaintiffs that "functional obsolescence is not a consideration in the determination of depreciation under the new concession regulations." Brief for Defendants, Apr. 9, 2001, at 27. Therefore, because a dispute on this issue no longer remains, the Court will not opine on the matter except to note that the defendants' position is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

M. The Use of Leasehold Surrender Interests in Financing

The plaintiffs argue that the defendants' regulation improperly prevents them from pledging their leasehold surrender interests as collateral for financing. Specifically, the plaintiffs claim that they are improperly prohibited from pledging their leasehold surrender interest in one national park for a loan needed to make an improvement in another national park.[17]

Section 5954(a)(2)(A) of the 1998 Act states that a leasehold surrender interest

> may be pledged as security for financing of a capital improvement or the acquisition of a concessioner's

[17] The Court also notes that part of the plaintiffs' argument on this matter has been rendered moot. In their complaint and summary judgment motion, the plaintiffs argued that the defendants' regulations prevented them from using leasehold surrender interests as collateral in re financing. In their opposition, the defendants explained that the "general types of refinancing suggested by the plaintiffs are appropriate [under 36 C.F.R. § 51.87]." *See* Brief for Defendants, Apr. 9, 2001, at 28. Although the Court need not now consider this issue, the Court does note that the defendants' statement, inasmuch as it addresses the specific issue, is tantamount to an official enunciation of their policy on this issue. *See Washington Legal Foundation*, 202 F.3d at 336.

> contract when approved by the Secretary pursuant to this subchapter.

16 U.S.C. § 5954(a)(2)(A). The defendants' regulation, codified at 36 C.F.R. § 51.87, states that a leasehold surrender interest may be encumbered

> either to finance the construction of capital improvements under the applicable concession contract in the applicable park area or to finance the purchase of the applicable concession contract.

36 C.F.R. § 51.87.

To begin with, the 1998 Act explicitly makes the securitization of every loan subject to the "approv[al] of the Secretary." Thus, Congress specifically gave the NPS a significant role in deciding when leasehold surrender interests may be pledged as security. Second, the Court sees no provision of the 1998 Act which "sp[eaks] directly to the issue" of whether a concessioner may pledge his leasehold surrender interest in one park for a loan in another park. *Chevron*, 467 U.S. at 841. The plaintiffs argue to the contrary, citing the definition of "capital improvement." *See* Brief for Plaintiffs, Feb. 28, 2001, at 25. The 1998 Act defines a capital improvement as a

> structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concessions contract and located on the lands of the United States within a unit of the National Park System.

16 U.S.C. § 5954(e)(2). The plaintiffs assert that, because the 1998 Act permits the securitization of leasehold surrender interests to finance a "capital improvement," and the statutory definition of "capital improvement" refers to "a concessions contract ... within a unit of the National Park System," Congress has "directly spoken to the issue" of whether an interest in one park may be used to secure a loan for a project

in a separate park. *Chevron*, 467 U.S. at 841; *see also* Brief for Plaintiffs, Feb. 28, 2001, at 25.

This argument is preposterous. It strains even the most active imagination to think that Congress addressed the crosspark collateralization of concession loans in such a labyrinthian way. Finding that the 1998 Act is "silent or ambiguous with respect to [this] issue," the Court next finds the disputed regulation to be a reasonable interpretation of the Act. The regulation is grounded in the rational belief that cross-park collateralization expands the deleterious effects of loan defaults. A default on a cross-collateralized loan would put several facilities in several parks at risk. Moreover, when a bank forecloses on a loan, the bank will install its own replacement concessioner resulting in doubtless transitional inconveniences and miscues. *See* Brief for Defendants, Apr. 9, 2001, at 30. With this understanding, the Court has little hesitation in finding the disputed regulation to be reasonable.

N. The Timing of Compensation for a Concessioner's Leasehold Surrender Interest

The plaintiffs argue that the defendants' regulation addressing the payment of former concessioners' leasehold surrender interests is contrary to law. The Court finds that the plaintiffs have no standing to make this claim.

The disputed regulation, 36 C.F.R. § 51.61(a), states the following:

> The date for payment of the leasehold surrender interest value, except in special circumstances beyond the [NPS's] control, will be the date of expiration or termination of the surrender interest contract, or the date the concessioner ceases to utilize related capital improvements under the terms of the concession contract.

The plaintiffs argue that this regulation is contrary to 16 U.S.C. § 5954(c), which reads in part:

> Upon expiration or termination of a concessions contract entered into after the effective date of this subchapter, a concessioner shall be entitled under the terms of the concessions contract to receive from the United States or successor concessioner the value of any leasehold surrender interest in a capital improvement as of the date of such expiration or termination.

Viewing the defendants' regulation and the 1998 Act together, the Court first observes that section 5954(c) only applies to concession contracts entered into after the effective date of the 1998 Act, which is November 13, 1998. Three of the four plaintiffs now in front of the Court (Amfac, Aramark, and Hamilton Stores) entered into their contracts before this date. Thus, their contracts are not controlled by the terms of section 5954(c), and they have cited no other statutory provision which the defendants' regulation allegedly violates. Their motions on this issue are thus denied.[18]

The fourth plaintiff, the National Park Hospitality Association ("NPHA"), undoubtedly has members with concession contracts entered into after November 13, 1998. However, there is no way to determine whether an injury is actual or imminent unless the Court focuses on the expiration dates of specific contracts of NPHA members. As such, the resolution of this issue would require the "individual participation" of NPHA members, a factor that has long stood in the way of associational standing. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); *see also Harris* v. *McRae*, 448 U.S. 297,

---

[18] To clarify the Court's holding, the Court does not find that these plaintiffs have no standing. As long as they have valid concession contracts, and the disputed regulation still applies to them, they have standing to challenge the regulation. However, their claims fail on the merits because, without the applicability of section 5954(c), they have no statutory provision which even remotely grants them a right on which the defendants' regulation infringes.

320-21 (1980) (finding an association to lack standing because the cause of action required the court to assess the motivations of specific association members); *Parks* v. *United States Internal Revenue Serv.*, 618 F.2d 677, 684-85 (10th Cir.1980) (denying a union standing because the alleged damages were "individual ... [and] not common to nor shared by all of the union members."). The Court therefore dismisses this claim from each of the plaintiffs' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1).

O. The Defendants' Restrictions on Concessioners' Corporation Control Transfers

The plaintiffs claim that the defendants' regulation permitting NPS review of corporate control transfers is contrary to the 1998 Act. The Court disagrees.

The relevant provision of the 1998 Act states:

> No concessions contract or leasehold surrender interest may be transferred, assigned, sold, or otherwise conveyed or pledged by a concessioner without prior written notification to, and approval by, the Secretary.

16 U.S.C. § 5957. The defendants' regulation implementing this provision states:

> The concessioner may not assign, sell, convey, grant, contract for, or otherwise transfer (such transactions collectively referred to as "assignments" for purposes of this part), without the prior written approval of the Director, any of the following:
>
> (a) Any concession contract;
>
> (b) Any rights to operate under or manage the performance of a concession contract as a subconcessioner or otherwise;
>
> (c) Any controlling interest in a concessioner or concession contract; or

> (d) Any leasehold surrender interest or possessory interest obtained under a concession contract.

36 C.F.R. § 51.85. The plaintiffs specifically argue that the 1998 Act gives the defendants no permission to approve or disapprove of any transfer of a controlling interest of a concessioner. *See* 36 C.F.R. § 51.85(c).

The Court first finds that the statutory language "or otherwise conveyed or pledged" is wholly silent with respect to the instant issue. That is, the terms "conveyed" and "pledged" have a multitude of meanings, no particular one of which is made clear in the statute. Thus, finding the terms to be ambiguous on this issue, the Court considers the reasonableness of the defendants' regulation.

The Court has little hesitation in declaring the reasonableness of 36 C.F.R. § 51.85. Elsewhere in the 1998 Act, Congress instructs the Secretary to disapprove contract transfers if the acquiring party is not "qualified or able to satisfy the terms and conditions of the concession contract" or, if the transfer would not be "consistent with the objectives of protecting, conserving, and preserving the resources ... of the National Park System." 16 U.S.C. § 5957(b). In light of these objectives, the defendants' regulation is a reasonable way to ensure that unqualified persons or entities do not put at risk any of our nation's natural treasures. If a company owning a concession contract were to be sold to another company, that new company (which might even be foreign to the United States) might have a wholly different policy or attitude with respect to its role as a concessioner. Moreover, even though this regulation remains in place, concessioners denied the right to transfer business interests can always bring an arbitrary and capricious claim, alleging that the NPS is misapplying section 5957(b). On its face, however, the regulation must stand.

P. Conclusion

In conclusion, after reviewing the cross motions for summary judgment and the applicable law, the Court finds that the disputed regulations are permissible in all respects except one: the defendants may not deprive a concessioner of a preferential right of renewal if the concessioner fails to bid on a prospectus.

III. CONCLUSION

For the foregoing reasons, the Court DENIES the plaintiffs' Rule 56(f) motion; GRANTS in part and DENIES in part the defendants' motion to dismiss; GRANTS in part and DENIES in part the plaintiffs' joint motion for summary judgment; and GRANTS in part and DENIES in part the defendants' motion for summary judgment. An order consistent with this Opinion shall issue separately this date.

ORDER

Consistent with the Memorandum Opinion issued this date, it is hereby

ORDERED that the defendants' motion to dismiss [11-1, 8-1, 12-1, 6-1] is DENIED as to all claims, except with respect to the timing of compensation for a concessioner's leasehold surrender interest and Hamilton Stores' franchise fee claim, for which it is GRANTED. It is therefore ORDERED that the plaintiffs' claim with respect to the timing of compensation for a concessioner's leasehold surrender interest and the franchise fee claim of Hamilton Stores are DISMISSED WITH PREJUDICE. Further, it is

ORDERED that the defendants' motion for summary judgment [11-2, 8-2, 12-2, 6-2] is GRANTED as to all issues addressed therein, except with respect to the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, for which it is DENIED. It is therefore ORDERED that all of the plaintiffs' claims addressed in the

defendants' January 18, 2001 motion for summary judgment, except for the claim regarding the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, are DISMISSED WITH PREJUDICE. Further, it is

ORDERED that the plaintiffs' joint motion for partial summary judgment on the regulations pertaining to the contractual right of preference in renewal [35-1, 28-1, 39-1, 18-1] is DENIED with respect to all issues presented therein; further, it is

ORDERED that the plaintiffs' joint motion for summary judgment on the regulations pertaining to contract performance and concessioner choice issues [36-1, 29-1, 40-1, 19-1] is DENIED with respect to all issues presented therein, except for the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, for which it is GRANTED. It is therefore DECLARED that 36 C.F.R. § 51.35 is contrary to law to the extent it deprives concessioners of a statutory right of preferential renewal for not bidding on a prospectus. Further, it is ORDERED that the defendants are enjoined from applying 36 C.F.R. § 51.35 to the extent that the application deprives concessioners of a statutory right of preferential renewal for not bidding on a prospectus. Further, it is

ORDERED that the plaintiffs' joint motion for summary judgment on the regulations pertaining to concessioner investment and corporate control issues [37-1, 30-1, 41-1, 20-1] is DENIED with respect to all issues presented therein; further, it is

ORDERED that Hamilton Stores' motion for summary judgment of the franchise fee issue [64-1] is DENIED; further, it is

ORDERED that plaintiff Aramark's motion to extend time filed on January 19, 2001 [Civ. A. No. 00-3085, 10-1] is GRANTED; further, it is

ORDERED that plaintiff Hamilton Stores' motion to extend time filed on April 30, 2001 [Civ. A. No. 00-2937, 61-1] is GRANTED; further it is

ORDERED that the plaintiffs and the defendants, within 10 days of this date, file with the Court a description of all alleged claims, that have not been ruled on by the Court. Each claim shall contain a citation to the portion of the complaint lodging that claim. A proposed order setting a schedule for the resolution of any remaining claims shall also be attached.

Further, the Clerk of the Court is ORDERED to make the following corrections to the docket:

in Civil Action No. 00-2838: terminate motion [19-1], which was ruled on by Order of April 24, 2001[64]; transfer motion [56-1], which was not filed in this case, to Civil Action No. 00-2937, in which it was filed; terminate motion [72-1], which was not filed in this case; terminate motion [74-1], which was not filed in this case .

in Civil Action No. 00-2937: terminate motion [17-1], which was ruled on by Order of April 24, 2001[53]; terminate motion [37-1] which was withdrawn by pleading [62]; terminate motion [62-1], which was not actually a motion, but a notice of the withdrawal of a motion.

SO ORDERED.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5223 September Term, 2001
00cv02838
00cv02885
00cv02937
00cv03085

Filed On: May 8, 2002

AMFAC RESORTS, L.L.C.,
Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Appellees

Consolidated with 01-5226, 01-5229, 01-5233

BEFORE: Randolph and Garland, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed April 15, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5223

September Term, 2001
00cv02838
00cv02885
00cv02937
00cv03085

Filed On: May 8, 2002

AMFAC RESORTS, L.L.C.,
Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Appellees

Consolidated with 01-5226, 01-5229, 01-5233

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX E

No. 94-496C
(Judge Bruggink)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OLEN MAFFETT POUND d/b/a COLES POINT MARINA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT UPON COUNT I OF THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT UPON COUNTS II AND III AND DEFENDANT'S COUNTERCLAIM

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
Director

JEANNE E. DAVIDSON
Assistant Director

OF COUNSEL:

G. ROGERS SLOAN
Office of Counsel
Vicksburg District Corps
of Engineers
2101 N. Frontage Road
Vicksburg, MS 39180-5191

MARY L. SMITH
Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
2nd Floor, Todd Bldg.
Washington, D.C. 20530
Telephone: (202) 307-6289

Attorneys for Defendant

April 28, 1995

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
94-496C

OLEN MAFFETT POUND d/b/a
COLES POINT MARINA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT UPON COUNT I OF THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT UPON COUNTS II AND III AND DEFENDANT'S COUNTERCLAIM

Pursuant to Rules 12(b)(1) and 56 of the Rules of the United States Court of Federal Claims ("RCFC"), we respectfully request dismissal of Count I of the complaint for lack of subject matter jurisdiction, or in the alternative, summary judgment on Count I. Furthermore, defendant requests summary judgment on Counts II and III and on defendant's counterclaim. In support of this motion, we rely upon the pleadings, the following brief, with appendix[1] and the accompanying proposed findings of uncontroverted fact.

In this action, plaintiff, Olen Maffett Pound ("Pound"), was operating a concession at Cole's Point, Sardis Lake, Panola County, Mississippi, pursuant to Lease No. DACW38-1-81-169 (the "Lease") with the United States Army Corp of Engineers (the "Corps"). Defendant's motion to dismiss Count I of the complaint should be granted because this

[1] "App." refers to the appendix to this brief.

Court does not possess jurisdiction over Mr. Pound's breach of contract claim because Mr. Pound elected to pursue this claim before the Corps of Engineers Board of Contract Appeals ("ENGBCA"). Alternatively, defendant is entitled to summary judgment on Count I because there is no genuine issue of material fact that the Government properly revoked the Lease given that Mr. Pound violated paragraphs 3, 4, 9, 12, 13, 14, 15, and 18 of the Lease. Furthermore, defendant is entitled to summary judgment on Mr. Pound's claim contained in Count II for implied-in-fact contract to transfer his leasehold interest and Mr. Pound's claim for destruction of assets contained in Count III. Finally, defendant is entitled to summary judgment on its counterclaim for its approximately three-year effort to administer the revocation of the Lease and for its intensive cleanup and restoration of the premises formerly occupied by Mr. Pound.

QUESTIONS PRESENTED

1. Whether the Lease is governed by the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq*.

2. Whether the Election Doctrine binds Mr. Pound to his decision to appeal his revocation of the Lease claim to the ENGBCA thereby requiring dismissal of Count I of the complaint.

3. Whether, in the alternative, defendant is entitled to summary judgment on Count I because there is no genuine issue of material fact that Mr. Pound breached numerous provisions of the Lease.

4. Whether defendant is entitled to summary judgment on Count II because there is no genuine issue of material fact that there was no mutual assent between the parties and, accordingly, no implied-in-fact contract between defendant and Mr. Pound to transfer his leasehold interest.

5. Whether defendant is entitled to summary judgment on Count III because there is no genuine issue of material

fact that the Lease expressly provides that Mr. Pound has no claim against the United States for destruction of assets.

6. Whether defendant is entitled to summary judgment on its counterclaim.

STATEMENT OF THE CASE

I. Nature Of The Case

In this case, Mr. Pound operated a concession at Cole's Point, Sardis Lake, Mississippi, that included cabins for rent, nontransient trailers, a restaurant, a campground, and a marina. After Mr. Pound's conviction for drug trafficking and his personal absence from the premises, defendant revoked Mr. Pound's Lease on January 26, 1990.

After the revocation, the Government devoted an extensive amount of time and effort over an approximately three-year period administering the revocation, cleaning up the premises, and restoring the premises. This complicated cleanup effort was necessitated primarily by a deterioration of tire and wooden breakwaters which Mr. Pound had constructed on the premises. As a result of the disintegration of the breakwaters, the Government removed several tons of debris from the waters of Sardis Lake and the surrounding area.

In Count I, Mr. Pound alleges that the Government improperly revoked his Lease. In Count II, Mr. Pound alleges that an implied-in-fact contract existed between the parties in order to transfer his leasehold interest. In Count III, Mr. Pound seeks recovery for the alleged destruction of some items of his personal property. The Government has also alleged a counterclaim for its expenses incurred related to the Lease and its cleanup and restoration efforts. As demonstrated below, however, defendant is entitled to summary judgment in its favor on all three counts of the complaint and on its counterclaims.

* * *

B. Mr. Pound's Revocation Of Lease Claim Is Subject To The Contract Disputes Act

In Count I of his complaint, Mr. Pound asserts that the Government is liable to him because the Government arbitrarily and capriciously revoked his Lease. Compl. ¶ 47.

Under the plain language of the Contract Disputes Act ("CDA" or "Act"), 41 U.S.C. §§ 601-613 (1988), the CDA applies to any express or implied contract for the procurement of property, other than real property in being, entered into after the effective date of the Act:

> Unless otherwise specifically provided herein, *the Act [the CDA] applies to any express or* implied *contract* . . . entered into by an executive agency for --
>
> (1) the procurement of property, other than real property in being; [and]
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a) (emphasis added).

Mr. Pound's revocation of lease claim is subject to the CDA under either section 602(a)(3) or section 602(a)(4). As an initial matter, any claim pursuant to the lease falls under section 602(a)(4) because this lease is a contract for the disposal of personal property. The modern trend has been to treat leases as contracts rather than as conveyances of real property. *Passaic Distributors, Inc.* v. *Sherman Company,* 386 F. Supp. 647 (S.D.N.Y.); *Robert J. Di Domenico*, GSBCA No. 5539, 80-1 BCA ¶ 14,412 at 71,039.

* * *

Alternatively, in this case, the Lease falls within section 602(a)(3) because it concerns the "procurement of construction, alteration, repair or maintenance of real property." In this case, Mr. Pound was a concessioner who constructed several structures on the property at Cole's Point, including the breakwaters. Paragraph 4 of the Lease demonstrates that the Lease was for Government's procurement of construction by stating that the "lessee shall have the right . . . to erect such structures and to provide such equipment upon the premises as may be necessary." App. 140. Further, several paragraphs of the Lease demonstrate that the Lease was the Government procurement of maintenance services at Cole's Point. Paragraph 6 provides that Mr. Pound "will *maintain* all circulation roads within the trailer park." App. 140 (emphasis added). Paragraph 13 provides that Mr. Pound "shall keep the premises in good order and in a clean, sanitary, and safe condition and shall at all times *maintain* all structures and equipment." App. 141 (emphasis added).

* * *

Supreme Court, U.S.
FILED
OCT 9 2002
OFFICE OF THE CLERK

(2)

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

22 pp

QUESTION PRESENTED

Whether a National Park Service regulation that states that National Park Service concession agreements are not contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is valid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bonneville Assocs. v. *United States*, 43 F.3d 649 (Fed. Cir. 1994)	10, 11
Caldwell & Santmyer, Inc. v. *Glickman*, 55 F.3d 1578 (Fed. Cir. 1995)	14
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215 (1945)	13
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	3
Coastal Corp. v. *United States*, 713 F.2d 728 (Fed. Cir. 1983)	9, 10
G.E. Boggs & Assocs., Inc. v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992)	9
Grunley Constr. Co., 99-1 B.C.A. (CCH) ¶ 30,138 (1998)	15
J.E.M. AG Supply, Inc. v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593 (2001)	13
Libra Eng'g Inc., NASA BCA No. 1182-17, 1984 WL 13526 (July 13, 1984)	14-15
Lorillard v. *Pons*, 434 U.S. 575 (1978)	4, 12-13
National Park Concessions, Inc., 94-3 B.C.A. (CCH) ¶ 27,104 (1994)	14
New Era Constr. v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989)	10, 11
Oroville-Tonasket Irrigation Dist. v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995)	8

Cases—Continued: Page

Pacrim Pizza Co. v. *Pirie*, No. 00-1534, 2002 WL 31103521 (Fed. Cir. Sept. 23, 2002) 11
Pasteur v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) 14
Pound v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996) 15
R & R Enters., 89-2 B.C.A. (CCH) ¶ 21,708 (1989) 14
Schickler v. *Davis*, 10 Fed. Appx. 944 (Fed. Cir.), cert. denied, 122 S. Ct. 277 (2001) 9
Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997) 6-7
United States v. *Rodgers*, 466 U.S. 475 (1984) 13
YRT Servs. Corp. v. *United States*, 28 Fed. Cl. 366 (Fed. Cl. 1993) 4, 5, 10, 11
Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 7, 8, 9

Constitution, statutes and regulations:

U.S. Const. Art. III 14
Act of Oct. 9, 1962, Pub. L. No. 87-762, 76 Stat. 761 8
Act of Aug. 21, 2002, Pub. L. No. 107-217, § 3(e)(2), 116 Stat. 1299 (to be codified at 40 U.S.C. 3142) 11
Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 3
41 U.S.C. 602(a) 10
41 U.S.C. 609(b) 6, 14
Davis-Bacon Act, 40 U.S.C. 276a(a) 11
Dependents' Medical Care Act, ch. 374, 70 Stat. 250 (10 U.S.C. 1071-1106) 8
10 U.S.C. 1076(a)(1) 8
Little Tucker Act:
28 U.S.C. 1346 16
28 U.S.C. 1346(a)(2) 11

Statutes and regulations—Continued: Page

National Park System Concessions Policy Act, 16 U.S.C. 20 *et seq.* 2
16 U.S.C. 20d (1964 & Supp. II 1967) 2
National Parks Omnibus Management Act of 1998, 16 U.S.C. 5901 *et seq.*:
16 U.S.C. 5951-5966 3
16 U.S.C. 5951(b) 7
16 U.S.C. 5951(b)(1) 7
16 U.S.C. 5952 ..... 4, 5, 13
16 U.S.C. 5954(a)(1) 12
16 U.S.C. 5954(a)(3) 12
16 U.S.C. 5954(b)(2) 16
16 U.S.C. 5954(d) 12
16 U.S.C. 5956(b) 16
Reclamation Authorizations Act of 1976, Pub. L. No. 94-423, § 201, 90 Stat. 1325 8
Service Contract Act of 1965, 41 U.S.C. 351 *et seq.* 11
Tucker Act:
28 U.S.C. 1491 16
28 U.S.C. 1491(a)(1) 11
28 U.S.C. 1491(b) 16
16 U.S.C. 1 ..... 2, 8
18 U.S.C. 1001 13
36 C.F.R.:
Section 51.1 (1993) 12
Section 51.3 3
Section 51.3 (1993) 14

Miscellaneous:

57 Fed. Reg. (1992):
p. 40,496 ..... 12, 14
p. 40,508 3
65 Fed. Reg. (2000):
p. 20,630 2

Miscellaneous—Continued:	Page
pp. 20,630-20,631	3
p. 20,635	5, 12
pp. 26,052-26,085	3
S. Rep. No. 202, 105th Cong., 2d Sess. (1998)	13

In the Supreme Court of the United States

No. 02-196

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 282 F.3d 818. The opinion of the district court (Pet. App. 35a-92a) is reported at 142 F. Supp. 2d 54.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002. A petition for rehearing was denied on May 8, 2002 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on August 6, 2002. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the National Park Service (NPS) to oversee our national parks and "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1; Pet. App. 49a. In furtherance of those goals, the NPS has permitted private, for-profit concessioners, like those represented by petitioner, to provide visitors with "lodging, food, merchandising, transportation, outfitting and guiding, and similar activities." 65 Fed. Reg. 20,630 (2000); Pet. App. 49a.

Concessioners operate their businesses in national parks pursuant to certain concession agreements reached with the NPS. For many years, those concession agreements were governed only by NPS internal regulations and policies. Pet. App. 2a. In 1965, Congress enacted the National Park System Concessions Policy Act (1965 Act), 16 U.S.C. 20 *et seq.*, which codified many of the NPS's longstanding concessions policies. Pet. App. 4a. Under the 1965 Act, a concessioner paid the government a franchise fee—generally a percentage of gross revenue—in exchange for the privilege of operating its business in a national park. *Ibid.* Critically, for purposes of this litigation, the 1965 Act also gave concessioners, at the time of the expiration of their concession agreements, a right of preference of renewal, which amounted, basically, to a right of first refusal. 16 U.S.C. 20d (1964 & Supp. II 1967).

In 1992, following a review of national park concessions, the Department of the Interior concluded that the right of preference in renewal enjoyed by incumbent concessioners had significantly impeded the competition for concession contracts. See 57 Fed. Reg. 40,508 (1992). Eventually, Congress stepped in, enacting the National Parks Omnibus Management Act of 1998 (1998 Act), 16 U.S.C. 5951-5966, which eliminated the preferential right of renewal and enacted other rules governing concession contracts. In 2000, the NPS, implementing the 1998 Act, issued new regulations that established the new concession contract process. 65 Fed. Reg. at 20,630-20,631. Among other things, the regulations provided that "[c]oncession contracts are not contracts within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions." 36 C.F.R. 51.3. That regulation was supplemented by publication of a "Standard Concession Contract" in the *Federal Register*, which incorporated the changed terms. See 65 Fed. Reg. at 26,052-26,085.

2. Petitioner, an association of concessioners, brought suit in district court, alleging, *inter alia*, that the NPS regulation is contrary to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* The district court rejected that argument. Pet. App. 67a. The district court found that the CDA is ambiguous with respect to whether concession contracts are procurement contracts for the purposes of the CDA. *Id.* at 68a. Applying *Chevron* deference, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984), the district court upheld the NPS

regulation as a reasonable interpretation of the CDA. Pet. App. 69a. The court recognized that "the basic nature of concession contracts differs markedly from that of typical procurement contracts" in several respects. *Id.* at 68a. In concession agreements, the government is not attempting to procure chattel or services for itself; instead, it is permitting another to use its land as in a lessor/lessee relationship. *Ibid.* Furthermore, when the government procures something, it usually acts as payor, not payee as in the case of a concession contract. *Id.* at 68a-69a.

Turning to the legislative history of the 1998 Act, the court found that Congress had categorized concession contracts "as authorization contracts, not procurement contracts." Pet. App. 69a (citing 16 U.S.C. 5952). Further, the court noted that when Congress defined concession contracts as such in 1998, "the prevailing understanding was that concession contracts were not procurement contracts." *Ibid.* The court based that conclusion on the fact that NPS regulations implementing the 1965 Act had expressly stated that concession contracts were not "Federal procurement contracts," and on the holding of *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (Fed. Cl. 1993), that "concession contracts 'did not constitute a procurement,'" because the NPS was not paying funds, but was collecting fees in exchange for granting a permit to operate a concession business. Pet. App. 69a. The district court concluded that Congress was presumed to have known about and therefore to have adopted that view when it enacted the 1998 Act without foreclosing that interpretation. *Id.* at 69a-70a (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). Thus, Congress, in the 1998 Act, had ratified the then-prevailing view that

concession contracts were not procurement contracts. *Id.* at 70a.

The court acknowledged petitioner's citations to decisions of certain administrative tribunals that reached contrary conclusions, but concluded that most of the cases pre-dated Congress's ratification of the view that concession contracts are not procurement contracts. Pet. App. 70a. As for the one administrative decision issued after the 1998 Act, the court noted that it was not bound by that tribunal's determination. *Ibid.*

3. The court of appeals affirmed the district court's ruling concerning the validity of the NPS regulation, concluding that NPS concession contracts are not procurement contracts within the meaning of the CDA. The court of appeals acknowledged that the district court may have decided the case on an incorrect ground, noting "the Park Service does not administer the Contract Disputes Act, and thus may not have interpretive authority over its provisions." Pet. App. 27a. However, it concluded that the NPS's regulatory determination that concession contracts are outside the ambit of the CDA is supported by the clear language of both the CDA and the 1998 Act. *Ibid.*

Noting that a procurement contract is one in which "the government bargains for, and pays for, and receives goods and services," the court of appeals concluded that "[c]oncession contracts are not of that sort." Pet. App. 27a (quoting 65 Fed. Reg. at 20,635). Rather, under the 1998 Act, NPS was empowered to enter into concession contracts "'to authorize a person, corporation, or other entity to provide accommodations, facilities and services to' visitors to national parks." *Ibid.* (quoting 16 U.S.C. 5952). The court found yet more support for the NPS's understanding of its concession contracts in *YRT Services Corp.*, 28 Fed. Cl. at 392 n.23,

which, examining concession contracts under a different statutory regime, held that "this arrangement does not constitute a procurement, but is a grant of a permit to operate a business." Pet. App. 28a.

Like the district court, the court of appeals acknowledged that the Interior Department Board of Contract Appeals (IBCA) had reached the opposite conclusion. However, the court also took note of that administrative panel's authorizing legislation, the CDA, which stated that the decisions of the IBCA "on any question of law shall not be final or conclusive." 41 U.S.C. 609(b); Pet. App. 28a. The court further found that the "IBCA's rationale for determining that concession contracts are procurement contracts is flawed." *Ibid.* It noted that the IBCA's first decision on the issue recognized that the CDA "does not cover all contracts but then assumed that the Act *does* apply unless coverage is explicitly foreclosed." *Ibid.* "Nothing in the Act," said the court of appeals, "suggests such a sweeping presumption." *Ibid.* In response to another IBCA opinion which had held that the CDA must apply if any benefit can be traced to the government, the court reasoned that "[the fact] [t]hat the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act." *Id.* at 29a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of any other court of appeals or, for that matter, any other federal court. Accordingly, further review is not warranted.

1. Petitioner asserts that the decision below conflicts with a decision of the Federal Circuit, *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314, cert. denied, 522 U.S. 857 (1997), and a decision of its predecessor, the Court of Claims, *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552 (Ct. Cl. 1978). Petitioner's reliance on those cases is misplaced.

a. *Total Medical Management* concerned agreements between the military and a private health care company to provide health care to the dependents of servicemen. As noted by petitioner, in holding that the agreement at issue was a procurement contract subject to the CDA, the Federal Circuit relied upon the fact that the United States had "legal obligations to military dependents" to provide health care. Pet. 17 (quoting *Total Med. Mgmt.*, 104 F.3d at 1320). Petitioner's claims notwithstanding, the NPS has no similar "legal obligations" to park visitors.

Petitioner maintains that the NPS has a "statutory duty to provide 'accommodations, facilities and services that * * * are necessary and appropriate for public use and enjoyment' of the national parks," Pet. 9 (quoting 16 U.S.C. 5951(b)(1)). However, a cursory view of the statutory provision cited by petitioner reveals that there is no such "statutory duty" on the NPS. Section 5951(b), entitled "Policy", states that, to the extent that there is any development of "public accommodations, facilities, and services" within the national parks, that development "shall be *limited* to those accommodations, facilities and services that are * * * *necessary* and *appropriate* for public use and enjoyment" of the national park. 16 U.S.C. 5951(b)(1) (emphasis added). Far from imposing a statutory mandate for the provision of services to visitors, the statute cited by petitioner stands as a *limitation* on the pro-

vision of such services.[1] That limitation is quite different from the legal obligation of the military to provide health care in *Total Medical Management.* See Dependents' Medical Care Act, ch. 374, 70 Stat. 250 (codified at 10 U.S.C. 1071-1106); 10 U.S.C. 1076(a)(1) ("A dependent * * * is entitled * * * to the medical and dental care prescribed by section 1077 of this title.").[2]

b. *Yosemite Park & Curry Co.* also presents no conflict with the decision below. While the plaintiff in that case did have a concession agreement with the NPS, see 582 F.2d at 554 ("they executed a concession contract"), the contract at issue was *not* a concession agreement. Rather, it was a simple contract for the procurement of transportation services. "[P]laintiff agreed to provide bus service to the public without charge and defendant agreed to reimburse [plaintiff] for its actual expenses plus a reasonable profit for providing this service." *Ibid.* That is a typical procurement contract. Accordingly, the court held that the NPS was not exempt from procurement regulations, but was "bound by the procurement laws in the purchase of services, be they transportation services or some other variety, from a private contractor, whether that contractor is otherwise a 'concessioner' or not." *Id.* at 559. *Yosemite Park*, therefore, stands for the proposition that the existence of a concession agreement between the government and a party does not alter the character of a separate ordinary procurement contract. It does not suggest that a concessions contract is itself a procurement contract or is otherwise indistinguishable from a procurement contract, and indeed its premise is to the contrary. In any event, as the concession agreement in this case involves no payment by the government for services, but rather the payment of fees by the concessioner in exchange for a permit to operate of a business, it is quite obviously distinguishable from *Yosemite Park.*

2. The court of appeals' conclusion that the CDA does not apply to NPS concession agreements was correct. The CDA applies only to procurement contracts, and the NPS's concession contracts are not procurement contracts.

a. It is axiomatic that the CDA is not applicable to all government contracts. *Schickler* v. *Davis*, 10 Fed. Appx. 944, 946 (Fed. Cir.) (per curiam), cert. denied, 122 S. Ct. 277 (2001); *G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992); *Coastal Corp.* v. *United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). Contracts within the scope of the CDA are limited to those "entered into by an executive agency for—(1) the procurement of property, other than real property in being; (2) the procurement of services; (3)

---

[1] At most, NPS is required to protect and preserve the environment of the parks. 16 U.S.C. 1.

[2] Similarly, another case cited by petitioner (Pet. 18), *Oroville-Tonasket Irrigation District* v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995), yields no support for its argument. There, the agreement between the Department of the Interior and the irrigation district was not a concession agreement; it was a contract whereby the Department of the Interior paid the irrigation district to operate and maintain a unit of a dam project owned by the Department of the Interior. Moreover, as in *Total Medical Management*, the Department of the Interior was under a statutory mandate to perform those tasks; Congress ordered the Department of the Interior "to construct, operate, and maintain" that unit of the dam project. See *id.* at 21 ("Acts of October 9, 1962 and September 28, 1976 authorized the Secretary of the Interior to construct, operate and maintain the project unit in question to supply irrigation."); Reclamation Authorizations Act of 1976, Pub. L. No. 94-423, § 201, 90 Stat. 1325; Act of Oct. 9, 1962, Pub. L. No. 87-762, 76 Stat. 761.

the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. 602(a); see *Coastal Corp.*, 713 F.2d at 730 ("scope of the Act thus is limited to express or implied contracts for the procurement of services and property and for the disposal of personal property"). For purposes of the CDA, a "procurement" is "an acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the federal government." *Bonneville Assocs.* v. *United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); see *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989).

Thus, concession contracts like the NPS's Standard Form Concession Contract differ markedly from procurement contracts in at least two respects. First, "[u]nlike traditional government contracts, the government does not make payments to the contractor." *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 371 (Fed. Cl. 1993). Rather, "contractors, known as concessioners, charge for services provided to the public, and, in turn, pay NPS a fee for the right to operate a concession business." *Ibid.*[3] Thus, in a concession contract, "the government is not committing to pay out government funds or incur any monetary liability." *Id.* at 392 n.23.[4] In this case, it is undisputed that NPS does not

[3] Accordingly, the Court of Federal Claims concluded that a NPS concession contract for lodging facilities issued pursuant to the 1965 Concessions Policy Act was "unique from a standard government contract," and was not subject to procurement contracts laws. *YRT Servs. Corp.*, 28 Fed. Cl. at 393.

[4] Petitioner criticizes the court of appeals for quoting this phrase because "CDA coverage explicitly does not depend on the expenditure of appropriated funds." Pet. 12 n.2 (citing 41 U.S.C. 602(a)). Petitioner's criticism is off the mark. While the CDA does

make payments to concessioners under its concession contracts.

Second, in a concession contract, the contractor provides a benefit directly to the public (or some other third-party), whereas in a procurement contract, the benefit is provided to the government. *New Era Constr.*, 890 F.2d at 1157 (contract was not a procurement contract within meaning of CDA because contract was not for benefit of the federal government). Here, the services concessioners offer for sale benefit, first and foremost, the concessions' customers. As demonstrated above (pp. 7-8, *supra*) the NPS has no statutory duty to provide services to visitors. Thus, the only benefits obtained by the government from the provision of services by concessioners are those that emanate from providing a more enjoyable stay for park visitors. Such benefits are incidental in nature, flowing only

indeed extend to the contracts of "nonappropriated fund activities described in [the Tucker Act]"—to wit, military exchanges, see 28 U.S.C. 1346(a)(2), 1491(a)(1); *Pacrim Pizza Co.* v. *Pirie*, No. 00-1534, 2002 WL 31103521, at *1 (Fed. Cir. Sept. 23, 2002)—that provision has nothing to do with this case. The NPS, unlike a military exchange, is an appropriated fund instrumentality, and thus the CDA applies to its procurement contracts. Thus, the question is not whether "CDA coverage * * * depend[s] on the expenditure of appropriated funds." Pet. 12 n.2. Rather, the relevant inquiry is whether an expenditure by the government is required for there to be a procurement. The Federal Circuit, at least, has answered in the affirmative. *Bonneville Assocs.*, 43 F.3d at 653; *YRT Servs. Corp.*, 28 Fed. Cl. at 392 n.23. If the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, and the Davis-Bacon Act, 40 U.S.C. 276a(a) (repealed by Act of Aug. 21, 2002, Pub. L. No. 107-217, § 3(e)(2), 116 Stat. 1299 (to be codified at 40 U.S.C. 3142)), do not apply to NPS concession agreements, it is not because the NPS is a non-appropriated fund activity, but rather because NPS concession contracts entail no expenditure by the government that would trigger either statute.

indirectly to the government. The acquisition of such incidental and intangible benefits cannot convert that concession contract into a procurement contract.[5]

b. The court of appeals' decision is also consistent with the NPS's longstanding regulatory position and the legislative history of the 1998 Act. The NPS's regulatory position that concession contracts are not procurement contracts within the scope of the CDA is well-established and long pre-dates the 1998 Act. *E.g.*, 57 Fed. Reg. 40,496 (1992); 36 C.F.R. 51.1 (1993); 65 Fed. Reg. 20,635 (2000) (preamble to the 2000 regulation). Normally, Congress is presumed to be aware of an administrative interpretation of a statute and to have adopted that interpretation when, in enacting a new statute, it incorporates portions of the prior law subject to the administrative interpretation. See *Lorillard* v.

[5] Petitioner's argument that the NPS, through its concession contracts, procures "construction, alteration, repair or maintenance of real property" does not alter the analysis. Pet. 10. To be sure, the United States has title to all real property constructed by concessioners on NPS land. 16 U.S.C. 5954(d). However, concessioners hold a leasehold surrender interest in any capital improvement they make on NPS land, equal in value to the construction cost, plus inflation, "less depreciation * * * as evidenced by the condition and prospective serviceability in comparison with a new unit of like kind." 16 U.S.C. 5954(a)(1) and (3). To the extent that petitioner complains that normal upkeep and maintenance costs are not added to the leasehold surrender value, and, therefore, the NPS "procures" that benefit in a concession contract, any benefit falls to the NPS only incidentally. The primary beneficiaries of the maintenance and upkeep of the concession's real property are the concessioner (as it minimizes the depreciation of its leasehold surrender interest and allows for the continued successful operation of its for-profit business) and the concession's customers (who may continue to have safe enjoyment of the concession).

Pons, 434 U.S. 575, 580-581 (1978). The legislative history confirms that Congress likewise distinguished concession contracts from ordinary procurement contracts. "The Committee considers that * * * [concessions] contracts do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998). In light of that presumption and legislative history, the textual reference to "concessions contract" should be understood as distinguishing such contracts from procurement contracts. See 16 U.S.C. 5952 ("the Secretary shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System").

Petitioner's reliance on *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*, 122 S. Ct. 593, 598 (2001) (utility patents for plants); *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984) (breadth of the term "jurisdiction" in 18 U.S.C. 1001); and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945) (scope of the Public Vessels Act), is also misplaced. These cases stand for the unremarkable proposition that a court of appeals may not "add limiting language to a statute that Congress intended to be broad and comprehensive." Pet. 12. However, in upholding the NPS regulation, the court of appeals did not attempt to add limiting language to the CDA, but rather faithfully interpreted the language of the 1998 Act. Congress's actions there spoke authoritatively as to its view as to whether concession agreements are within the scope of the CDA.

c. Petitioner asserts that the court of appeals' decision conflicts with the administrative decisions of the

Department of the Interior Board of Contract Appeals and the contract appeals boards in other federal agencies. That argument does not aid petitioner.

It is a sufficient response to petitioner's argument to note, as the court of appeals did, that the boards of contract appeals in federal agencies are creatures of the CDA and their decisions are not binding on the D.C. Circuit or any other Article III court. 41 U.S.C. 609(b) (the decision of such boards "on any question of law shall not be final or conclusive"); *Caldwell & Santmyer, Inc.* v. *Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) ("In reviewing the decision of an agency board on any question of law, we are not bound by the conclusions of the board."). Whether procurement contracts include concession contracts is, of course, a matter of law. *Pasteur* v. *United States*, 814 F.2d 624 (Fed. Cir. 1987).

Moreover, many of the administrative decisions petitioners invoke pre-date the 1998 Act and the regulations subsequently promulgated by the NPS. See, *e.g.*, *National Park Concessions, Inc.*, 94-3 B.C.A. (CCH) ¶ 27,104 (1994) (holding that National Park concession contract is subject to the CDA whenever the government obtains any benefit; refusing to consider the Department of the Interior's regulation stating that concession contracts are not procurement contracts, 57 Fed. Reg. at 40,496 (codified in 36 C.F.R. 51.3 (1993)), because it was published after the date of the contract and settlement agreement at issue); *R & R Enters.*, 89-2 B.C.A. (CCH) ¶ 21,708 (1989) (holding that a NPS concession contract was subject to the CDA because it was for services the government would otherwise provide and because no statutory exemption from the Act or exclusionary intent by Congress is evident). Still others did not concern concession contracts at all. See, *e.g.*, *Libra Eng'g Inc.*, NASA B.C.A. No. 1182-17, 1984

WL 13526 (July 13, 1984) (appeal of Smithsonian Institution's termination for default of a construction contract and related claims; appeal dismissed after settlement); *Grunley Constr. Co.*, 99-1 B.C.A. (CCH) ¶ 30,138 (1998) (contractor on contract with Army Corps of Engineers for repair of the Kennedy Center roof terrace and penthouse sought equitable adjustment because the government directed it to provide a specific type of granite; Board assumed jurisdiction pursuant to the CDA).[6]

3. Petitioner's assertion that this case has implications beyond NPS concession contracts, including "a significant portion of *all* government procurement contracts," Pet. 19, is off the mark. While it may well be true that the "government contracts to purchase more than $220 billion in goods and services each year," Pet. 18, those government procurement contracts will not be affected by the outcome of this case. This case will have no significant impact on the body of law governing the purchase of goods and services because this case does not involve the purchase of goods and services. It concerns only NPS concession contracts.

---

[6] Petitioner contends that the Department of Justice took a contrary position in *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996). Pet. 15-16. However, there are numerous distinctions between the instant case and *Pound*. First, as referred to in the petition (Pet. 16 n.5), the parties in *Pound* agreed the CDA applied because at issue there was Pound's lease of land–his possession and control of government property–not his permit to operate a business. Second, Pound's lease was with the Army Corp of Engineers, not the NPS, and thus NPS regulations were not implicated. Third, even if the NPS regulations did have application, Pound entered into his lease in 1981, many years before the 1998 Act amended the rules concerning NPS concessions.

Moreover, even without access to a board of contract appeals, petitioner and the concessioners it represents will continue to have access to neutral forums for the resolution of disputes with the NPS over concession agreements. First, disappointed bidders on concession contracts have the right to engage in a bid protest. 28 U.S.C. 1491(b). Second, the 1998 Act itself provides in two instances for the resolution of disputes through binding arbitration. See 16 U.S.C. 5954(b)(2), 5956(b). Finally, depending on the amount of money at issue, a concessioner may bring a claim in the Court of Federal Claims under the Tucker Act or in the district court under the Little Tucker Act. 28 U.S.C. 1346, 1491. Therefore, contrary to petitioner's assertions, this case has no special importance that merits certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

OCTOBER 2002

Supreme Court, U.S.
FILED
OCT 22 2002
OFFICE OF THE CLERK

(3)

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Bartlett & Co. Grain, 91-1 BCA 23415, AGBCA No. 86-187-1, 1990 WL 166521 (Oct. 18, 1990) 4

Bonneville Assoc. v. *United States*, 43 F.3d 649 (Fed. Cir. 1994) 4

Coffey v. *United States*, 626 F. Supp. 1246 (D. Kan. 1986) 4

New Era Constr. v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) 7

Oroville-Tonasket Irrigation Dist. v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995) 2, 3

Starfleet Marine Transp, Inc., B-290181, 2002 U.S. Comp. Gen. Lexis 90 (July 5, 2002) 9

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 1, 7, 9

United States v. Texas, 507 U.S. 529 (1993) 8

Watch Hill Concession Inc., IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911 (Feb. 16, 2001) 8

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 2

YRT Servs. Corp. v. *United States*, 28 Fed. Cl. 366 (Fed. Cir. 1993) 3

STATUTES, RULES AND REGULATIONS

16 U.S.C. § 1 ..... 1, 5

16 U.S.C. § 5951 ..... 5, 6

TABLE OF AUTHORITIES – continued

Page(s)

16 U.S.C. § 5952 6

41 U.S.C. § 602 ..... 3, 6

41 U.S.C. § 609 9

41 U.S.C. § 611 9

Standard Concession Contract, 65 Fed. Reg. 26,052, (May 4, 2000) 6

MISCELLANEOUS

http://www.nps.gov/legacy/business.html#concessions (visited Oct. 21, 2002) 10

S. REP. NO. 105-202 8

S. Rep. No. 95-1118 ..... 9, 10

REPLY BRIEF FOR PETITIONER

As we demonstrated in the petition, this Court's review of the D.C. Circuit's decision is warranted, because that decision (1) conflicts with decisions of the Federal Circuit, several contract boards of appeals, and the Comptroller General, (2) cannot be reconciled with the plain language of the CDA, and (3) will have an adverse effect on government contracting even far removed from the $800-million National Park Service concessions program. The government's response to each of these arguments mischaracterizes precedent, ignores important statutory language, attempts to recast the very nature of the National Park Service, and is entirely unpersuasive.

1. Respondents' attempt to wish away the circuit split between the D.C. Circuit and the Federal Circuit is singularly unsuccessful. The *only* distinction that respondents draw between this case and *Total Medical Management, Inc.* v. *United* States, 104 F.3d 1314 (Fed. Cir. 1997), is that in *Total Medical* the United States had "legal obligations" to provide medical care to military dependents. Br. in Opp. 7. But as discussed in the petition (at 4-6; see also page 5 *infra*), the NPS has a similar legal obligation to "promote and regulate the use of" the national parks by "provid[ing] for the enjoyment of the same." 16 U.S.C. § 1. Concessions contracts for the provision of food and lodging in the national parks meet that legal obligation. In any event, the spurious rationale now put forward by the government for distinguishing *Total Medical* was *not* the basis for the decision below.

The Federal Circuit plainly held in *Total Medical* that the CDA applies to government contracts that procure goods or services for the benefit of third parties rather than for the government itself. 104 F.3d at 1320. *The D.C. Circuit rejected that reading of the statute.* It held that the CDA was inapplicable here solely because the function of concessions

contracts is to procure goods or services for third parties (park visitors) rather than for the government. See Pet. App. 27a. There is a clear conflict between the D.C. Circuit and the Federal Circuit on this bedrock issue of federal procurement law.

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978), also conflicts with the decision below. Although in *Yosemite Park* the government paid the concessioner to provide bus service to park visitors, that is irrelevant to the applicability of the CDA. Rather, the services provided in *Yosemite Park* were indistinguishable from those at issue in the typical concessions contract: in both instances, the concessioner is fulfilling the NPS's statutory mandate to provide for the public's enjoyment of the national park. And the *Yosemite Park* court specifically held that "the broad power of the Secretary of the Interior to grant concessions in the course of administering National Parks [does not] relieve[] him, and through him the NPS, from compliance with the generally acceptable procurement guidelines." *id.* at 558. As the court explained, it was "not convinced that the NPS * * * can avoid normal, legally mandated, procurement procedures, simply by characterizing the procurement of transportation services for the public as the granting of a 'concession' to a specific contractor." *Ibid.* That this holding directly conflicts with the decision below is evident merely by removing the word "transportation" from the quoted sentence.[1]

---

[1] *Oroville-Tonasket Irrigation District* v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995), also conflicts with the D.C. Circuit's decision. Respondents are flatly incorrect in asserting (Br. in Opp. 8 n.2) that "the Department of the Interior paid the irrigation district to operate and maintain a unit of a dam project owned by the Department of the Interior." Rather, it is clear that the contract required that the Oroville-Tonasket Irrigation District ("OTID") "operate[] and maintain[]" the dam after its construction "at

2. The decision below is also plainly wrong. As we explained in the petition, the NPS "procur[es] services" (41 U.S.C. § 602(a)(2)) when it contracts with a concessioner; this procurement enables it to fulfill its mandate to offer the public services that the NPS has solicited as being "necessary and appropriate" to accommodate visitors in the national parks. The NPS also typically "procur[es the] construction, alteration, repair or maintenance of real property" (*id.* § 602(a)(3)) in its concessions contracts; the agency retains title to all developments within the parks and requires that concessioners build and maintain these facilities. See Pet. 9-10.

a. Respondents' principal argument for why NPS concessions contracts fall outside the CDA is that "'[u]nlike traditional government contracts, [in concessions contracts] the government does not make payments to the contractor.'" Br. in Opp. 10 (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 371 (Fed. Cir. 1993)). This formalistic distinction is simply irrelevant.

Nothing in the plain language of the CDA distinguishes among contracts based on whether the government contractor is paid in cash or is compensated in some other way, such as by being afforded the opportunity to earn income.[2]

OTID's expense." 33 Fed. Cl. at 22; see also *id.* at 17 (after construction of the irrigation works OTID "will assume control of and will operate and maintain such works at its expense"). Thus, as the court explained, OTID was "carry[ing] out the obligation placed by Congress on the Secretary of the Interior to operate and maintain the project in question." *Id.* at 22. *Oroville-Tonasket* is therefore indistinguishable from the present case, and the D.C. Circuit's decision directly conflicts with that of the Court of Federal Claims.

[2] Tellingly, respondents fail to address our explanation (at Pet. 13) why *YRT* is inapposite, in that it did not purport to address applicability of the CDA – the case involved a different statute – and

Moreover, the formalistic payment distinction that respondents invoke implies that the CDA's applicability depends, not on a contract's substance, but on how it happens to be framed. Under this theory, if the government collects visitor revenues and then sends back a percentage (even a large one) to the contractor, then the CDA applies. But if, as here, a contractor collects revenues in the first instance and sends a percentage (a comparatively small one) to the government, the CDA does not apply. Congress can hardly have intended for bedrock CDA protections against agency mistreatment of contractors to turn on such whimsical distinctions – distinctions that agencies themselves are entirely at liberty to manipulate.

Finally, in a very real sense the NPS *does* pay for concessioners' services: if it did not use concessioners the NPS would provide similar services itself and would collect the profits that concessioners now earn. By using concessioners the NPS forgoes this income.

In any event, the cases respondents themselves cite show that the distinction among contracts based on whether there is an expenditure of appropriated funds is frivolous. Thus, in *Bonneville Associates* v. *United States*, 43 F.3d 649 (Fed. Cir. 1994), which respondents quote (at Br. in Opp. 10; see also *id.* at 10 n.4), the Federal Circuit defined a procurement subject to the CDA to include the "acquisition by * * * *barter*[] of property or services." *Id.* at 653 (emphasis added); see also, *e.g.*, *Bartlett & Co. Grain*, 91-1 BCA 23,415, AGBCA No. 86-187-1, 1990 WL 166521 (Oct. 18, 1990) (CDA applies to a "payment-in-kind" contract between the Commodity Credit Corporation and a contractor, involving the trade of corn for soybeans); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986) (CDA applies to contract

---

was expressly based on a now-repudiated understanding of the views of the Comptroller General.

involving exchange of grain for the retirement of a farm loan). Obviously, no appropriated funds are expended in a barter situation; thus, contrary to the government's key contention, the expenditure of appropriated funds cannot be critical to CDA applicability.

b. Respondents' second explanation for why NPS concessions contracts escape the CDA is that these contracts benefit "the public" rather than "the government" and that "the NPS has no statutory duty to provide services to visitors." Br. in Opp. 11. Again, this rationale finds no support in the CDA itself, which applies unambiguously to all government contracts for the procurement of goods or services or for the maintenance or construction of real property. *Nothing* in the statute turns on slippery determinations of who may be said to "benefit" from the procurement.

In any event, in making this assertion respondents again simply ignore the NPS's authorizing legislation. In fact, since its very founding the NPS has been required to

> *promote and regulate the use* of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein *and to provide for the enjoyment of the same* in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added).[3] The 1998 Act reiterates this

---

[3] Thus, respondents' assertion (at Br. in Opp. 8 n.1) that "[a]t most, NPS is required to protect and preserve the environment of the parks. 16 U.S.C. 1" is disingenuous at best. It is flatly contradicted by the statutory provision respondents themselves cite, which also requires the agency to "provide for the enjoyment" of the parks.

"fundamental purpose" of conserving the parks "and providing for their enjoyment." See 16 U.S.C. § 5951(a). Thus, it is manifest that the NPS has an obligation to provide services to national park visitors. In fact, the 1998 Act requires the NPS to allow *only* those public facilities that "are *necessary* and appropriate for public use and enjoyment" of the national parks. See *id.* § 5951(b)(1) (emphasis added).[4] By authorizing a concessioner to offer any given service the NPS is determining that that service forms a necessary part of the agency's mandate to provide for the public's enjoyment of the national parks.[5]

Moreover, respondents offer virtually no response to the argument that, assuming "benefit to the government" does matter under the CDA, the government is plainly the principal beneficiary of the contractual provisions requiring concessioners to construct, maintain and repair real property. Respondents' answer – buried in a footnote (Br. in Opp. 12 n.5) – that the NPS has only an incidental interest in the maintenance and development of real property in the national parks is frivolous. As we have explained (at Pet. 10), the NPS controls what is built in the national parks, when it is built, how it is built, and how it is maintained; more importantly, the government retains title to all real property in the national parks.

---

[4] Congress made this mandate abundantly clear when it additionally imposed numerous requirements for the solicitation, award and administration of these contracts in the 1998 Act, proclaiming that, in "selecting the best proposal, * * * consideration of revenue to the United States shall be *subordinate* to the objectives of * * * providing necessary and appropriate facilities to the public at reasonable rates." See 16 U.S.C. § 5952(5)(A)(iv) (emphasis added).

[5] See also Standard Concession Contract, 65 Fed. Reg. 26,052, 26,063 (May 4, 2000) (reiterating statutory purpose and providing that contract is "necessary and appropriate for the public use and enjoyment of the Area").

Under the government's logic, the CDA would not apply if a contractor "construct[s], alter[s], repair[s] or maint[ains] real property" (41 U.S.C. § 602(a)(3)) owned by the government if that property is used heavily by the general public. *Nothing* in the text of the CDA supports such a limitation, and it is flatly contradicted by precedent. The CDA has long been held to apply to contracts for the maintenance and repair of, among other public facilities, the Kennedy Center and the Smithsonian Museums. See Pet. 11.[6]

c. Respondents proffer a hodgepodge of other reasons to justify the court of appeals' decision, but none has merit. That the decision below is "consistent with the NPS's longstanding regulatory position and the legislative history of the 1998 Act" (Br. in Opp. 12) is irrelevant. As we have discussed (at Pet. 12-13) – and as respondents acknowledge (at Br. in Opp. 13-14) – the NPS's earlier regulations were consistently rejected by the expert IBCA. To the extent Congress is presumed to be aware of prior law (*id.* at 12-13), the relevant prior law was the consistent holding of those entrusted with the authority to implement the CDA – the IBCA, as well as the Court of Federal Claims and the Federal Circuit – that concessions contracts are, in fact, governed by the CDA. However, Congress need not have been aware of *any* prior

---

[6] *New Era Construction* v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) – (cited at Br. in Opp. 11) – is not to the contrary. The contract at issue in *New Era* was not covered by the CDA for the straightforward reason that the United States was not a party to that contract. See *id.* at 1154. Rather, the contractor entered into a construction contract with the independent housing authority of an Indian tribe, which in turn had a separate financing contract with the Department of Housing and Urban Development. See *ibid.* To the extent *New Era* can be said to require services to be for the *direct* benefit of the federal government, that holding does not survive the Federal Circuit's later holding in *Total Medical* that where a contractor assists the government in fulfilling a legal obligation to the public, that contract is covered by the CDA.

law, because the CDA was not addressed in the 1998 Act.

The isolated statements in the legislative history of the 1998 Act that "'[t]he Committee consider[ed]'" concessions contracts not to be procurement contracts (Br. in Opp. 13 (quoting S. REP. No. 105-202, at 39) (first alteration supplied)) are entitled to no weight. The issue in this case is the proper interpretation of the *CDA*, not the 1998 Act. Hence, this legislative history is of no moment. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993) (subsequent legislative history regarding one statute deserves no weight in interpretation of entirely different pre-existing statute); *Watch Hill Concession Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *5 (Feb. 16, 2001).

Although it is true that IBCA decisions are not *binding* on courts (Br. in Opp. 14), that is a flimsy reason to *ignore* them. Rather, this persuasive authority from the expert Boards charged with implementing the CDA consistently concludes that the CDA does apply to NPS concessions contracts.[7] And respondents' attempt (Br. in Opp. 15 n.6) to distinguish its own argument in *Pound* – that concessions contracts *are* covered by the CDA because they involve the repair or maintenance of real property (see Pet. 15) – is feeble. That the government there made its argument in the alternative is true but irrelevant, as is the fact that the contract was with the Army Corps of Engineers instead of the NPS. As we have explained, our argument is not NPS-specific, but rather applies to all similar contracts. Under the government's position in *Pound* the CDA would apply to the con-

[7] Respondents' attempt to distinguish some of the IBCA's specific decisions because they predated the 1998 Act and its regulations (Br. in Opp. 14-15) is both irrelevant – the IBCA has reiterated this view since those regulations were enacted (see *Watch Hill*, 2001 WL 170911) – and incompatible with their separate argument (Br. in Opp. 12-13) that passage of the 1998 Act did not affect the CDA's applicability to NPS concessions contracts.

cessions contracts at issue in this case.[8]

3. Finally, respondents' self-serving assurances (Br. in Opp. 16) that the decision in this case is of "no special importance" are wrong for at least three reasons. First, the fact that NPS concessioners are in limited circumstances authorized to engage in bid protests, binding arbitration, or Tucker Act litigation under the 1998 Act (*ibid.*) in no way undermines the importance of the independent protections of the CDA. As we have explained (at Pet. 3-4), Congress passed the CDA because it considered agency-supplied avenues for resolving contractual disputes to be inadequate. It therefore provided distinct rights to contractors from whom the government procures the goods and services that support its functions, including *de novo* review of agency decision-making and entitlement to interest after a successful CDA challenge. See 41 U.S.C. §§ 609(a)(3), 611. This case will thus "influence[] how, whether, and at what prices [contractors such as national park concessioners will] compete for Government contract business." S. REP. NO. 95-1118, at 4.

Respondents' attempt to limit this case's applicability solely to NPS concessions likewise fails. We have never asserted that the court of appeals' decision will affect government contracts for goods and services each year. Compare Pet. 19 with Br. in Opp. 15. But the decision *will* affect the vast array of concessions contracts and similar arrangements entered into by various government agencies – ranging from the Department of Defense (*Total Medical*, *supra*) to the Army Corps of Engineers (Pet. 20 n.7) to the NPS. It is criti-

[8] Respondents *completely ignore* the recent decision of the Comptroller General, in which he disagreed with the decision of the D.C. Circuit in this case, and explained why NPS concessions contracts are covered by statutes like the CDA. See *Starfleet Marine Transp., Inc.*, B-290181, 2002 U.S. Comp. Gen. LEXIS 90 (July 5, 2002); Pet. 14-15.

cal that government agencies not be afforded unfettered power to exempt themselves unilaterally from the scope of the CDA simply by attempting to alter the terms of their contracts to fall within the D.C. Circuit's decision in this case. See S. REP. NO. 95-1118, at 17.

Finally, even were this case to apply only to NPS concessions contracts it would warrant this Court's review. The NPS concessions industry generates over $800 million in revenue annually (see http://www.nps.gov/legacy/business.html#concessions) – providing significant financial benefits to the government. More importantly, these concessioners provide vital assistance to the NPS in serving the literally millions of Americans who visit the national parks each year. By depriving NPS concessioners of any meaningful dispute resolution rights, the court of appeals' decision will at a minimum have a substantial effect on this entire industry.

* * * * *

In sum, by virtue of conflicting decisions of the D.C. Circuit, the Federal Circuit, and the Comptroller General, massive confusion now exists over the coverage of a federal statute that is critical to the government procurement process. The court of appeals erred by failing to recognize the NPS's attempts to use empty formalisms improperly to eviscerate substantive CDA protections – protections that Congress was careful to provide as shields against wrongdoing by contracting agencies like the NPS. The decision also upsets prior understandings and rewards the government's inconsistent litigating positions, to the detriment of a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. REP. NO. 95-1118, at 1. Further review by this Court is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

OCTOBER 2002

Supreme Court U.S.
FILED
DEC 27 2002
OFFICE OF THE CLERK

(4)

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, DC 20530-0001
(202) 514-2217

Counsel for Federal Respondents

PETITION FOR CERTIORARI FILED AUGUST 6, 2002
CERTIORARI GRANTED NOVEMBER 12, 2002

175 pp

TABLE OF CONTENTS

Page

A. Relevant Docket Entries: U.S. District Court for the District of Columbia 1

B. Relevant Docket Entries: U.S. Court of Appeals for the District of Columbia Circuit 6

C. Complaint 10

D. Order Granting Certiorari 28

E. "Prospectus Under Which a Concession Contract Will Be Open For Comeptition For The Operation Of: Accommodations, Facilities, and Services On the South Rim of Grand Canyon National Park," April 5, 2001 (excerpts) 29

F. Final Rule, Concessions Contracts, 65 Fed. Reg. 20,630 (April 17, 2000) (excerpts) 157

G. Simplified Concession Contracts; Revision, 65 Fed. Reg. 44,894 (July 19, 2000) (excerpts) 168

NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

A. Opinion of the United States Court of Appeals for the District of Columbia Circuit, filed March 1, 2002 ..... 1a

B. Opinion of the United States District Court for the District of Columbia, filed May 23, 2001. ..... 35a

TABLE OF CONTENTS
(continued)

Page

C. Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing, filed May 8, 2002 ..... 93a

D. Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing en banc, filed May 8, 2002 ..... 94a

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 00-CV-2885
(*Lead Docket: No. 00-CV-2838*)

NATIONAL PARK HOSPITALITY ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Defendants

RELEVANT DOCKET ENTRIES*

DATE	#	DOCKET ENTRY
[following entries are from Docket in 00-2885]		
12/1/00	1	COMPLAINT filed by plaintiff NATIONAL PARK HOSPITALITY

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

Because in the district court this case was consolidated with three other similar lawsuits, and thereafter the clerk only fully updated the docket sheet in the "lead" case, the docket presented here is derived from both that in the instant case and that in the "lead" case.

DATE	#	DOCKET ENTRY
		ASSOCIATION
1/19/01	8	MOTION filed by federal defendants to dismiss complaint, or, in the alternative for summary judgment
1/23/01	14	ADMINISTRATIVE RECORD filed by federal defendants
1/25/01	12	MOTION filed by DELAWARE NORTH PARK SERVICES to intervene
1/30/01	17	ADMINISTRATIVE RECORD filed by federal defendants
2/14/01	24	MEMORANDUM/ORDER by Judge Royce C. Lamberth granting plaintiffs' joint motion to consolidate case Nos. 00-2838, 00-2937, 00-2885 and 00-3085
2/14/01	--	ALL PLEADING IN THIS CASE ARE BEING DOCKETED AND FILED IN C.A. 00-2838 PURSUANT TO ORDER DATED 2/14/01.
		[following entries inserted from Docket in 00-2838]
2/28/01	34	RESPONSE (JOINT) by plaintiffs in opposition to motion to dismiss, motion for summary judgment, and miscellaneous discovery motions
2/28/01	36	JOINT MOTION (SECOND) by plaintiffs for partial summary judgment, on the grounds that the provisions of the NPS Solicitations and Regulations Pertaining to Contract Performance and Concessioner Choice Violate the 1998 ACT
3/7/01	40	NOTICE OF SUPPLEMENTAL

DATE	#	DOCKET ENTRY
		AUTHORITY RE: Tucker Act Jurisdiction and applicability of the contract disputes act by plaintiffs
4/9/01	53	MEMORANDUM by federal defendants in opposition to joint motion for partial summary judgment, on the grounds that the provisions of the NPS Solicitations and Regulations Pertaining to Contract Performance and Concessioner Choice Violate the 1998 ACT
4/9/01	54	REPLY by federal defendants to response in opposition to motion to dismiss by federal defendants, motion for summary judgment by federal defendants
4/24/01	61	MEMORANDUM AND ORDER by Judge Royce C. Lamberth granting motion for DELAWARE NORTH PARK SERVICES to intervene in 1:00-cv-02937 and 1:00-cv-02885
4/24/01	--	MOTION filed by intervenor-defendant DELAWARE NORTH PARK SERVICES to dismiss complaint
4/30/01	70	REPLY by plaintiffs in support of joint motion for partial summary judgment, on the grounds that the provisions of the NPS Solicitations and Regulations Pertaining to Contract Performance and Concessioner Choice Violate the 1998 ACT, and other claims
5/18/01	79	MOTION filed by plaintiff AMFAC RESORTS, L.L.C for preliminary injunction

DATE	#	DOCKET ENTRY
5/23/01	80	MEMORANDUM OPINION by Judge Royce C. Lamberth
5/23/01	81	ORDER by Judge Royce C. Lamberth: granting in part, denying in part motion to dismiss complaint; granting in part and denying in part joint motion for partial summary judgment, on the grounds that the NPS Solicitations and Regulations Pertaining to Contract Performance and Concessioner Choice Violate the 1998 ACT
5/23/01	84	ADMINISTRATIVE RECORD by federal defendant
6/25/01	105	JUDGMENT by Judge Royce C. Lamberth: judgment is entered in favor of defendants and these cases are dismissed with prejudice
6/27/01	109	MOTION filed by plaintiff AMFAC RESORTS, L.L.C for injunctive relief pending appeal
6/26/01	112	MEMORANDUM by plaintiff AMFAC RESORTS, L.L.C in support of motion for an injunction pending appeal
		[following entry in Docket in 00-2885]
6/28/01	53	NOTICE OF APPEAL by plaintiff NATIONAL PARK in 1:00-cv-02885 from judgment order entered on 6/25/01.
		[following entries inserted from Docket in 00-2838]
6/27/01	111	MOTION filed by plaintiffs for an injunction pending appeal

DATE	#	DOCKET ENTRY
7/2/01	115	MEMORANDUM by federal defendants in opposition to plaintiffs' motions for injunctions pending appeal
7/2/01	119	MEMORANDUM by intervenor-defendant DE NORTH PARKS SVC in opposition to motion for an injunction pending appeal
7/5/01	114	ORDER by Judge Royce C. Lamberth denying motions for injunctions pending appeal and related procedural motions

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 01-5223, 01- 5226, 01- 5229, 01- 5233

AMFAC RESORTS, L.L.C. *ET AL.*

Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Appellees

RELEVANT DOCKET ENTRIES*

6/29/01	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Amfac Resorts.
7/10/01	PER CURIAM ORDER filed, on the court's own motion, that Nos. 01-5223 and 01-5226 be consolidated
7/10/01	MOTION lodged by Appellant Amfac Resorts for injunction pending appeal
7/10/01	MOTION filed by Appellant Amfac Resorts to expedite briefing schedule, and to accelerate the date for oral argument

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

7/10/01	MOTION filed by Appellant National Park Hospitality Association for injunction pending appeal [missing from docket sheet]
7/10/01	MOTION filed by Appellant National Park Hospitality Association to expedite briefing schedule, and to accelerate the date for oral argument [missing from docket sheet]
7/11/01	PER CURIAM ORDER filed, on the court's own motion, that Nos. 01-5223, et al. and 01-5229 be consolidated
7/16/01	OPPOSITION filed by Appellee Delaware North Park Services to motions for injunction pending appeal
7/16/01	OPPOSITION filed by federal appellees to motions for injunction pending appeal
7/17/01	REPLY filed by Appellant Amfac Resorts in support of motion for injunction pending appeal
7/17/01	REPLY filed by Appellant National Park Hospitality Association in support of motion for injunction pending appeal [missing from docket sheet]
7/19/01	PER CURIAM ORDER filed denying motions for injunction pending appeal and granting motions for expedited briefing and oral argument
7/23/01	CLERK'S ORDER filed consolidating No. 01-5233 with No 01-5223, et al.
8/20/01	BRIEF filed by Appellant Amfac Resorts, et al.
8/20/01	ADDENDUM TO BRIEF filed by Appellant Amfac Resorts, et al.
8/20/01	APPENDIX filed by Appellant Amfac Resorts,

et al.

9/19/01	BRIEF filed by Federal Appellees DOI, et al., Non-Federal Appellee Delaware North Parks Svc, Inc. in 01-5223, et al.
9/19/01	STATUTORY AND REGULATORY APPENDIX filed by Appellees DOI, et al., in Nos. 01-5223, et al.
10/3/01	REPLY BRIEF filed by Appellants Amfac Resorts, et al., in Nos. 01-5223, et al.
11/6/01	ORAL ARGUMENT HELD before Randolph, Garland, Williams.
3/1/02	JUDGMENT affirming in part, reversing in part and vacating in part for the reasons in the accompanying opinion. Before Judges Randolph, Garland, Williams.
3/1/02	OPINION filed for the Court by Judge Randolph
3/1/02	CLERK'S ORDER filed The Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing.
4/15/02	PETITION for rehearing & PETITION for rehearing en banc filed by Appellants
5/8/02	PER CURIAM ORDER, in Banc, filed denying suggestion rehearing en banc
5/8/02	PER CURIAM ORDER filed denying petition rehearing
5/28/02	MANDATE ISSUED to Clerk, District Court
8/12/02	NOTICE filed by Clerk, Supreme Court advising of the filing on 8/6/02 and docketing on 8/8/02 of a petition for writ of certiorari. Supreme Court Docket No. 02-196.

11/15/02	NOTICE filed by Clerk, Supreme Court advising of the entry of an order on 11/12/02, granting the petition for writ of certiorari. Supreme Court Docket No. 02-196.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[CAPTION OMITTED]

COMPLAINT

The National Park Hospitality Association ("NPHA"), for its Complaint against the United States Department of the Interior, Secretary of the Interior Bruce Babbitt, and Director of the National Park Service Robert G. Stanton, avers as follows:

INTRODUCTION

1. This Complaint results from the latest attempt by the Department of the Interior's National Park Service, the Secretary of the Interior, and the Director of the National Park Service (collectively the "NPS") to deprive the concessioners who operate the public concession services in this country's national parks of their contractual, statutory, and constitutional rights, contrary to Congress's expressed intent and the public interest in promoting the development of park concessions.

2. The NPS has arbitrarily, capriciously, and unlawfully interpreted the National Park Service Concessions Management Improvement Act of 1998 ("1998 Act"), included as sections 401-419 of the National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (Nov. 13, 1998) (codified with irrelevant exceptions at 16 U.S.C. §§ 5951-5966), so as to deprive concessioners of their contractual, statutory and constitutional rights.

3. The NPS's erroneous interpretations of the 1998 Act were first embodied in its final regulations interpreting that statute, see "Concession Contracts," 65 Fed. Reg. 20630 (Apr. 17, 2000), 36 C.F.R. pt. 51 (the "Regulations"), which ignored the plain terms of the 1998 Act and the objections raised by the NPHA and others during the rulemaking process. Based on these unlawful Regulations, the NPS published a model "Standard Concession Contract," *see* 65 Fed Reg. 26052 (May 4, 2000) (the "Standard Concession Contract"), and has now commenced issuing prospectuses for new contract opportunities identical to that model.

4. The NPHA and its members object to key provisions of the prospectuses issued by the defendants, and to the Standard Concession Contract and Regulations on which they are based.

5. The regulations, Standard Concession Contract, and issued prospectuses clearly indicate that the NPS intends:

> (i) arbitrarily, capriciously, and unlawfully to choose new or replacement concessioners by denying many incumbents the contractual rights to preferential renewal that Congress specifically protected in the 1998 Act; by defining all renewal preferences too narrowly; and by inappropriately weighing certain factors for the selection of the best bid to the detriment of other, statutorily mandated, criteria.
>
> (ii) arbitrarily, capriciously, and unlawfully to circumscribe how it will interact with concessioners during their contracts by denying concessioners their statutory right to the protections of the Contract Disputes Act; by mandating unauthorized arbitration for disputes between the NPS and concessioners; by denying concessioners the right to encumber their investments to fund further development within the National Park system and to

refinance existing debt; by denying concessioners the right to engage in corporate control transactions without the approval of the NPS; and by retaining the ability unilaterally to change many contract terms.

(iii) arbitrarily, capriciously, and unlawfully to determine what payments concessioners are entitled to receive after a concession contract expires by undervaluing the concessioners' "leasehold surrender interests" and by denying them immediate compensation for those interests when they are displaced upon the expiration of a concession contract.

The NPS is thus engaged in an illegal plan to deprive concessioners of their contractual, statutory, and constitutional rights.

6. The NPS's attempt to expand its authority at the expense of concessioners would significantly increase the cost of running concessions and make the operation of concessions a much less desirable business. Accordingly, it would harm the millions of Americans who rely on concessioners to provide affordable services in the country's national parks and would thwart Congress's clear and oft-stated intention to put park concessions on a more "business-like" footing.

7. This Court should therefore declare the Regulations invalid to the extent that they violate concessioners' contractual, statutory, or constitutional rights, and enjoin the NPS from issuing any new prospectuses (based on the Standard Concession Contract or otherwise) that infringe on the rights of concessioners. Injunctive and declaratory relief is necessary to prevent the NPS from continuing its efforts to obtain, through unauthorized and unlawful regulations, prospectuses and contracts, restrictions on concessioners that are arbitrary and capricious, contrary to statutory requirements, and precluded by contract.

JURISDICTION AND VENUE

8. Jurisdiction in this Court is proper under 28 U.S.C. §§ 1331, 1346, 1361, 1491(b)(1), 2201, and 2202, and under 5 U.S.C. § 702.

9. Venue in this District is proper under 28 U.S.C. § 1391(b) and (e).

PARTIES

10. Plaintiff National Park Hospitality Association (NPHA), which was originally formed as an unincorporated association called the Western Conference of National Park Concessioners in 1929, is a non-profit trade association incorporated in the Commonwealth of Virginia. The goal of the NPHA is to enhance the experience of visitors to our national parks by focusing on issues of common concern, such as the quality of visitor services and facilities and the relationship between concessioners and the NPS. This has been accomplished both by encouraging cooperative projects with the NPS and by interacting with Congress and other governmental agencies on legislative initiatives to improve the visitor experience, conserve important park resources and protect the rights of Americans to visit and enjoy their national parks. With over 150 members, the NPHA represents the vast majority of park concessioners, both large and small, that provide service through concession contracts with the NPS. The NPHA has standing to challenge the Regulations, Standard Concession Contract and prospectuses. *See Hunt* v. *Washington Apple Advertising Comm.*, 432 U.S. 333, 334 (1977). It is an association that exists to represent its members in the regulatory context; its members are suffering imminent harm because, among other things, their bidding strategies for the prospectuses that the NPS has issued depend on the outcome of this litigation; and there is no need for an individualized remedy where, as here, only declaratory and injunctive relief is sought.

11. Defendant United States Department of the Interior is an agency of the United States. The National Park Service is a part of the Department of the Interior.

12. Defendant Bruce Babbitt is Secretary of the Interior and is sued in his official capacity.

13. Defendant Robert G. Stanton is the Director of the National Park Service and is sued in his official capacity. Mr. Stanton is the federal officer personally responsible for compliance with laws relating to the issuance of concession contracts.

BACKGROUND

Concessions In The National Park System

14. As set forth by Congress in 16 U.S.C. § 1, the fundamental purpose of the National Park system is:

> to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

15. "Provid[ing] for the enjoyment" of the national parks in most cases requires visitor service facilities – including lodges, restaurants, and retail outlets – and typically includes constructing, cleaning, and repairing those commercial establishments. Throughout its history the NPS has relied primarily on private contractors to build, maintain, and operate such facilities.

16. The first director of the NPS recognized that "[h]otel operators and restauranteurs * * * were reluctant to build facilities and conduct operations in parks that were relatively inaccessible to most Americans." He therefore "lured these businesses into parks by offering them contractual incentives" to counterbalance these extremely risky and frequently harsh business conditions. *See* National Park Service, "Concessions Reform" (available at http://www.nps.gov/pub_aff/-issues/concess.html) (attached as Exhibit 1). Among other incentives that the NPS has used and continues to use are awarding exclusive concessions, granting preferential rights of renewal, and guaranteeing concessioners that they will recoup the capital investments they make if their concessions are not renewed. In exchange, concessioners agree, among other things, to return an agreed-upon portion of gross revenues to the government and to make specified capital commitments to improve national park visitor facilities.

The Concessions Policy Act Of 1965

17. Although in 1998 Congress repealed the Concessions Policy Act of 1965 (the "1965 Act"), Pub. L. 89-249, 79 Stat. 969 (Oct. 9, 1965), formerly codified at 16 U.S.C. §§ 20-20g, almost all concessioners are currently operating under contracts that were issued pursuant to the 1965 Act and that embody 1965 Act policies and practices. The savings clause of the legislation that repealed the 1965 Act, *see infra* ¶ 25, provides that these contracts remains valid and enforceable.

18. The 1965 Act was designed to encourage concessioners to make necessary capital investments in national park facilities without diverting financial resources from the government. It protected concessioners from arbitrary NPS action by codifying the previous NPS practice of giving concessioners (i) a compensable property interest in capital projects and (ii) a right of preference in the renewal of concession contracts. Based on these two primary incentives, concessioners invested hundreds of millions of dollars in park facilities to serve the public. It is unlikely that concessioners would have been willing to make these investments if the 1965 Act had not been passed and these incentives not been given the force of law; indeed, concessioners had previously slowed their capital programs in reaction to legal questions raised about the validity of these rights.

19. The 1965 Act explicitly recognized concessioners' property rights in the facilities constructed during the course of a concession contract by codifying a federal right called the concessioners' "possessory interest" that had been a feature of many concession contracts since the 1940's. Section 6 of the 1965 Act states:

> A concessioner who * * * acquires or constructs, pursuant to a contract and with the approval of the Secretary, any structure, fixture, or improvement upon land owned by the United States within an area administered by the National Park Service shall have a possessory interest therein, which shall consist of all incidents of ownership except legal title * * *. The said possessory interest shall not be extinguished by the expiration or other termination of the contract and may not be taken for public use without just compensation.

16 U.S.C. § 20e.

20. Congress also defined the exact method of valuing this possessory interest, assuring that the concessioner would receive protection for the "sound value" of its interest. The 1965 Act defined "sound value" by explicit reference to the "reconstruction cost" of the facilities, rather than their lower replacement cost. *Ibid.*

21. Section 5 of the 1965 Act mandated that concessioners be given a "right of preference" in the renewal of their concession contracts:

> The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d.

22. These statutorily-required, contractual rights of renewal were critical to the decision of many concessioners to bid on concessions contracts and to invest in facilities development within the National Park system.

The Concessions Management Improvement Act Of 1998

23. Concerned with the NPS's management of the concessions program and other factors, Congress passed the 1998 Act on October 14, 1998, which President Clinton signed on November 13, 1998. The 1998 Act sought to further the mission of the national park system, by protecting the parks for the future while at the same time accommodating the need of users of the parks to have appropriate facilities and services. *See* 1998 Act § 402, 16 U.S.C. § 5951.

24. The 1998 Act governs the entire concessions contract process, from delineating the factors that confine the NPS's choice of concessioner at the outset to ensuring that concessioners' rights are protected when a contract expires.

25. The 1998 Act replaced the 1965 Act, which as a general matter was repealed. *See* 1998 Act § 415(a), 16 U.S.C. § 20 note. The 1998 Act specifically includes a savings clause, however, which provides:

> The repeal of [the 1965 Act] shall not affect the validity of any concessions contract or permit entered into under such Act, but the provisions of [the 1998 Act] shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit.

Ibid.

26. Thus, the 1998 Act protects the fundamental rights that were guaranteed to concessioners under the 1965 Act and under contracts issued pursuant to the 1965 Act. In par-

ticular, the savings clause makes the 1998 Act inapplicable "to the extent such provisions are inconsistent with the terms and conditions of any * * * contract" issued pursuant to the 1965 Act. *Ibid.*

The Regulations And Model "Standard Concession Contract"

27. The NPS promulgated draft regulations implementing the 1998 Act on June 30, 1999, and issued a draft Standard Concession Contract (that it represented would form the basis for future contracts) on September 3, 1999. In response to extensive commentary by the NPHA and others, the NPS modified both documents in some respects, but refused to address many of their most serious flaws. The final versions of the Regulations and model contract were published in April and May 2000, respectively. *See* ¶ 3, *supra.*

28. In the guise of "interpreting" the 1998 Act, the NPS adopted untenable positions on a number of issues critical to the concessions industry (*see* ¶¶ 38-102, *infra*) including persisting in following policies that Congress considered and rejected in enacting the 1998 Act. The NPS's attempt to expand its power over concessioners and ignore their vested rights will harm not just current concessioners, but also future concessioners and the American public.

The Hamilton Stores Prospectus

29. On October 2, 2000, almost five months after publishing the Standard Concession Contract, the NPS finally issued its first prospectus soliciting bids under the 1998 Act and the agency's implementing Regulations. That prospectus, Contract No. CC-Yell002-70 (the "Hamilton Stores Prospectus") (attached as Exhibit 2), covers the Yellowstone National Park general stores and food services concession currently served by Hamilton Stores, Inc. Hamilton Stores, which is a member of the NPHA, is operating these facilities under a contract issued pursuant to the 1965 Act and has performed all of its requirements under that contract satisfactorily.

30. The contract required by the Hamilton Stores Prospectus is in all relevant respects identical to the final Standard Concession Contract. Like the Regulations and Standard Concession Contract, it contains numerous illegal provisions, in violation of Hamilton Stores' current contract and the 1998 Act, that would deprive Hamilton Stores of its rights and would force it and any other bidder to agree to illegal and unfair terms in order to obtain the concession.

The Antelope Point Prospectus

31. On October 23, 2000, the NPS issued a second prospectus under the 1998 Act, for a new concession operation to be conducted at Antelope Point in the Glen Canyon National Recreation Area (the "Antelope Point Prospectus," Contract No. CC-GLCA007-01, attached as Exhibit 3). Because this prospectus is for a new facility there is no provision for an incumbent concessioner's renewal rights, nor for the calculation of that incumbent's possessory interest. In all other relevant respects, however, the Antelope Point Prospectus is identical to the Hamilton Stores Prospectus and the Standard Concession Contract, and is thus further confirmation of the NPS's decision systematically to undermine the rights of concessioners.

Future 1998 Act Prospectuses

32. Based on the Regulations, Standard Concession Contract, Hamilton Stores Prospectus, and Antelope Point Prospectus, the NPS has made clear that no future prospectuses will honor concessioners' contractual preferential rights of renewal. The NPS has also made clear that all new prospectuses will violate a substantial number of concessioners' other rights, as well as the clear terms of the 1998 Act.

33. At least one concessioner has therefore brought litigation challenging the Regulations and Standard Concession

Contract and seeking to obtain injunctive relief barring the issuance of a new prospectus for a specific concession. *See Amfac Resorts, L.L.C.* v. *U.S. Dept. of the Interior*, No. 1:98CV01734; *Amfac Resorts, L.L.C.* v. *U.S. Dept. of the Interior*, No. 1:00CV02838.

34. The NPHA, as the association representing almost all concessioners, seeks similar relief that would be more generally applicable to all concessioners and all prospectuses. Given the harm that the NPS's interpretation is causing concessioners, no good reason exists for further delay before challenging the NPS's unlawful interpretation of the 1998 Act and of contracts issued pursuant to the 1965 Act.

SPECIFIC ALLEGATIONS

35. The NPHA's specific challenges cover many aspects of the relationship between concessioners and the NPS: the rules by which new concessioners will be chosen, the rules governing how such concessioners will be treated during the period of concessions contracts (which rules will materially impact what concessioners will bid on such contracts), and the rules governing how incumbent concessioners' possessory interests or leasehold surrender interests will be calculated and when those interests will be paid to incumbents.

36. The Regulations, as well as the contractual implementation of those Regulations as evidenced by the Standard Concession Contract and the Hamilton Stores and Antelope Point Prospectuses, violate the 1998 Act in numerous ways as delineated below. In addition, the Regulations, both on their face and as applied, invade existing contractual rights of incumbent concessioners preserved by the 1998 Act. They are thus arbitrary, capricious, an abuse of the agency's discretion, and otherwise unlawful.

37. The Standard Concession Contract and the Hamilton Stores and Antelope Point Prospectuses also violate the 1998 Act, and among other things deny Hamilton Stores and other

incumbent concessioners the preferential right of renewal that they are entitled to by law. Thus, the Standard Concession Contract and all current and future NPS prospectuses based on it are arbitrary, capricious, an abuse of the agency's discretion, and otherwise unlawful.

* * *

OPERATION OF CONTRACTS

61. In its Regulations, Standard Concession Contract, and Hamilton Stores and Antelope Point Prospectuses the NPS has imposed improper conditions on the performance of concession contracts and on the avenues through which disputes concerning those contracts must be resolved. These final agency actions are arbitrary, capricious, and contrary to law.

62. The manner in which the NPS deals with its concessioners is a significant factor in how much concessioners (whether incumbent or otherwise) will bid for concessions contracts. This Court should therefore declare the Regulations to be arbitrary, capricious, and unlawful and enjoin the NPS from issuing new prospectuses that would operate under this scheme.

Applicability Of The Contract Disputes Act

63. The NPS has decreed that "[c]oncession contracts are not contracts within the meaning of * * * the Contract Disputes Act [41 U.S.C. § 601 *et seq.* ("CDA")]." 31 C.F.R. § 51.3. There is no basis for this attempt to exempt concessions contracts from the CDA, thus rendering the Regulations arbitrary, capricious, and contrary to the terms of the CDA.

64. The CDA applies to "any express or implied contract * * * entered into by an executive agency for (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property." 41 U.S.C. § 602(a).

65. The CDA creates fair dispute resolution procedures for contracts with federal agencies. Among other provisions, the CDA mandates that certain agency decisions about contracts be appealable to the Court of Federal Claims, 41 U.S.C. § 609(a)(1), which must review questions of law *de novo*, 41 U.S.C. § 609(a)(3).

66. Concessions contracts under the 1998 Act are covered by the CDA. The CDA applies "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1). The NPS is contracting to procure the provision of services by concessioners, to guarantee the availability of lodging, food and other amenities within the National Park system. The NPS also is procuring the maintenance of its property, because the concessioner does not acquire title to any structure it creates on National Park system lands under a 1998 Act contract. Furthermore, under those concessions contracts where the NPS chooses to require the concessioner to make significant capital improvements, the NPS is procuring the "construction, alteration, repair or maintenance" of that property.

67. The applicability of the CDA to concession contracts is important to concessioners because NPS concession contracts are of lengthy duration, often require significant up-front financial commitments, and by their terms provide the agency with broad unilateral discretion to alter many aspects of those contracts over time. The unlawful decision by the NPS to exempt itself from the CDA is thus of great importance to the contract solicitation process.

* * *

INJUNCTIVE RELIEF

103. The NPHA is entitled to preliminary injunctive relief because it can show a likelihood of success on the merits, and both the public interest and a balancing of the potential

harms weigh in favor of preserving the status quo and preventing the NPS's unlawful implementation of the 1998 Act.

104. The NPHA is also entitled to injunctive relief because there is no adequate legal remedy for the claims asserted herein. Unless enjoined preliminarily and permanently, defendants' actions and conduct will bring irreparable harm to the NPHA's members as potential bidders and existing concessioners whose preferential rights of renewal and other legal rights are being illegally frustrated by unlawful government agency action. The NPS's final actions – as set forth in the Regulations, Standard Concession Contract, Hamilton Stores Prospectus, and Antelope Point Prospectus – will also injure the public's interest in an orderly continuation of services in the country's national parks.

105. To preserve the rights of concessioners and the public interest, the Court should permanently enjoin the NPS from issuing prospectuses that fail to recognize incumbent concessioners' preferential right of renewal and that embody the arbitrary, capricious, and otherwise illegal policies and provisions described above.

COUNT I

(The Regulations Violate The Administrative Procedure Act)

106. Paragraphs 1-105 are incorporated herein as if set forth in full.

107. Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, a reviewing court has a duty to "hold unlawful and set aside" agency action found to be any of the following: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" (2) "contrary to constitutional right, power, privilege, or immunity;" (3) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and (4) "unsupported by substantial evidence." 5 U.S.C. § 706(2).

108. The NPS's "Concession Contracts" Regulations, 65 Fed. Reg. 20630 (Apr. 17, 2000), 36 C.F.R. pt. 51, must be held unlawful and set aside because they violate the 1998 Act, the ADRA, the CDA, and other statutory mandates in the numerous ways delineated above.

COUNT II

(The Standard Concession Contract Violates The Administrative Procedure Act)

109. Paragraphs 1-105 are incorporated herein as if set forth in full.

110. Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, a reviewing court has a duty to "hold unlawful and set aside" agency action found to be any of the following: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" (2) "contrary to constitutional right, power, privilege, or immunity;" (3) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and (4) "unsupported by substantial evidence." 5 U.S.C. § 706(2).

111. The Standard Concession Contract is plainly intended by the NPS to embody the exact terms and conditions of future prospectuses under the 1998 Act. Not only is the Standard Concession Contract consistent with the Regulations, but the Hamilton Stores Prospectus and Antelope Point Prospectus are also in all relevant respects identical to the Standard Concession Contract.

112. The Standard Concession Contract must be held unlawful and set aside, because (as delineated above) it contains numerous terms that violate the 1998 Act, the 1965 Act, other statutory mandates, and contractual obligations of the agency under its existing contracts with concessioners.

COUNT III

(The Standard Concession Contract Violates The Tucker Act)

113. Paragraphs 1-105 are incorporated herein as if set forth in full.

114. Under the Tucker Act, 28 U.S.C. § 1491, a reviewing court has a duty to "afford any relief that the court considers proper, including declaratory and injunctive relief except that monetary relief shall be limited to bid preparation and proposal costs" (28 U.S.C. § 1491(b)(2)), if agency action related to the "solicitation * * * for bids or proposals for a proposed contract or to the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement" (28 U.S.C. § 1491(b)(1)) is found to be any of the following: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" (2) "contrary to constitutional right, power, privilege, or immunity;" (3) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and (4) "unsupported by substantial evidence" (28 U.S.C. § 1491(b)(4) (incorporating the APA standard)).

115. The Standard Concession Contract is plainly intended by the NPS to embody the exact terms and conditions of future prospectuses under the 1998 Act. Not only is the Standard Concession Contract consistent with the Regulations, but the Hamilton Stores Prospectus and Antelope Point Prospectus are also in all relevant respects identical to the Standard Concession Contract.

116. The Standard Concession Contract must be held unlawful and set aside, because (as delineated above) it contains numerous terms that violate the 1998 Act, the 1965 Act, other statutory mandates, and contractual obligations of the agency under its existing contracts with concessioners.

* * *

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, plaintiff requests that the Court:

A. Enter preliminary injunctive relief pending final resolution of this matter barring the defendants, their officers, employees and agents, from implementing or enforcing any of the unlawful aspects of 36 C.F.R. pt. 51 and of the Standard Concession Contract, and in particular barring them from proceeding with the Hamilton Stores and Antelope Point Prospectuses.

B. Grant a preliminary and permanent injunction enjoining defendants from issuing new prospectuses that infringe on the rights of incumbent concessioners in any of the ways described in this Complaint.

C. Enter a declaratory judgment that defendants' promulgation of 36 C.F.R. pt. 51, the Standard Concession Contract, the Hamilton Stores Prospectus, and the Antelope Point Prospectus were in the respects described above arbitrary, capricious, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority or limitations, contrary to concession contracting laws and regulations including but not limited to the 1998 Act, an abuse of discretion, and otherwise not in accordance with law.

D. Enjoin the defendants to develop a constitutional procedure for the appeal from determinations of whether a concessioner's performance was satisfactory.

E. Order such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/
Kenneth S. Geller (DC Bar # 401130)
David M. Gossett (DC Bar # 468390)
MAYER, BROWN & PLATT
1909 K Street, NW
Washington, DC 20006
Tel: 202-263-3000
Fax: 202-263-3300
Counsel for Plaintiff National Park Hospitality Association

Dated: December 1, 2000

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 02-196

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

November 12, 2002

The petition for a writ of certiorari is granted.

APPENDIX E

PROSPECTUS
Accommodations, Facilities and Services,
South Rim, Grand Canyon National Park
National Park Service

[This table of contents has been added to indicate which sections of the Prospectus are included in this Joint Appendix, and on which page each included section starts]

	Page
TABLE OF CONTENTS	32
SUMMARY OF BUSINESS OPPORTUNITY	*omitted*
BUSINESS OPPORTUNITY	37
THE PARK AREA AND ITS MISSION	49
CONTRACT	
DRAFT CONTRACT	64
EXHIBITS	
A. Leasehold Surrender Interest	*omitted*
B. Operating Plan Supplements	*selections included, at* 117
C. Nondiscrimination	*omitted*
D. Land and Assignments	*omitted*
E. Government Personal Property Assigned	*omitted*
F. Project Procedures	*omitted*
G. Initial Leasehold Surrender Interest	*omitted*
H. Maintenance Plan Supplement	*omitted*
I. Insurance	*omitted*
J. Historic Personal Property	*omitted*
PROPOSAL INSTRUCTIONS	*omitted*
PROPOSAL PACKAGE	*selections included, at* 121

Page

APPENDICES

1. National Park Service and Its Mission; Concession Program Management 137
2. Public Law 105-391 Title IV: National Park Service Concessions Management Improvement Act of 1998. ..... *omitted*
3. 36 CFR, Part 51: Concession Management Regulations. ..... *omitted*
4. 2001 NPS Management Policies, Chapter 10: Commercial Visitor Services ..... *selections included, at* 153
5. Park Visitation ..... *omitted*
6. 2000 Approved Rates ..... *omitted*
7. Sample Operating Schedule ..... *omitted*
8. Concessioner's Financial Information ..... *omitted*
9. Existing Contract ..... *omitted*
10. Agreement for Determining the Value of the Possessory Interest in Certain Improvements under NPS Concession Contract No. CC-GRCA001-69; Statement of Value ..... *omitted*
11. Reclaimed Water Agreement ..... *omitted*
12. Changes in Insurance Requirements. ..... *omitted*
13. Utility Expense ..... *omitted*
14. Personal Property List. ..... *omitted*
15. Underground Storage Tanks ..... *omitted*
16. Grand Canyon Project Review Process; Grand Canyon National Park Construction Policies ..... *omitted*
17. XXX form ..... *omitted*
18. Tank Project Check List ..... *omitted*
19. Draft Grand Canyon National Park Government Housing Policy Statement ..... *omitted*

Page

20. Grand Canyon Hazardous Waste Management Plan ..... *omitted*
21. Community Recreation Center Special Use Permit ..... *omitted*
22. Special Rules for Management and Operation of Concessioner Operated Trailer Villages ..... *omitted*
23. Grand Canyon National Park map brochures and newspaper ..... *omitted*

[Prospectus begins on next page]

PROSPECTUS
South Rim Accommodations, Facilities and Services
CC-GRCA001-01

Table of Contents

SUMMARY OF BUSINESS OPPORTUNITY

BUSINESS OPPORTUNITY

CURRENT OPERATIONS
- Staffing at Peak Season
- The Current Contract
- Facilities

THE BUSINESS TO BE OPERATED
- Facilities and Services at Beginning of Contract
- Basic Financial Information

FUTURE OPERATIONS
- Building & Improvement Program
- Project Costs
- Transportation
- Environmental Management
- Utilities

PROPERTY OWNERSHIP AND PURCHASE
- Personal Property
- Real Property
- Estimates of Value

FRANCHISE FEES

SITE VISITS

THE PARK AREA AND ITS MISSION

DESCRIPTION OF PARK
- Park Headquarters Location
- Legislated Purpose and Significance of Park
- Compliance with Federal, State, and Local Laws and
- Park Jurisdiction
- Fire Protection
- Park Management Structure
- Park Interpretive Themes and Goals

PARK PLANNING DOCUMENTS AND PLANNED IMPROVEMENTS

PARK MANAGEMENT OBJECTIVES FOR CONCESSION SERVICES

CONTRACT

DRAFT CONTRACT

EXHIBITS

A. Leasehold Surrender Interest
B. Operating Plan Supplements
C. Nondiscrimination
D. Land and Assignments
E. Government Personal Property Assigned
F. Project Procedures
G. Initial Leasehold Surrender Interest
H. Maintenance Plan Supplement
I. Insurance
J. Historic Personal Property

PROPOSAL INSTRUCTIONS

Response Period for Submission of Proposal
Form in Which Proposal Must be Submitted
Where and How to Submit a Proposal
Proposals may be Considered Public Documents
Questions
Standards for Evaluation of Proposals and Selection
Right of Preference and Preferred Offeror Determinations
Congressional Review
Cautions to Offerors about Submission and Evaluation of Proposals

PROPOSAL PACKAGE

PROPOSAL LETTER

CERTIFICATE OF CORPORATE OFFEROR

PART A FACTORS AND REQUIREMENTS

PART B FACTORS AND QUESTIONS

Principal factor 1. The responsiveness of the Proposal to the objectives, as described in the prospectus, of protecting, conserving and preserving resources of the park area.

Principal factor 2. The responsiveness of the Proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates.

Principal factor 3. The experience and related background of the Offeror, including the past performance and expertise of the offeror in providing the same or similar visitor services as those to be provided under the concession contract.

Principal factor 4. The financial capability of the Offeror to carry out its proposal.

Principal factor 5. The amount of the proposed minimum franchise fee, if any, and/or other forms of financial consideration to the Director (However, consideration of revenue to the United States will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.)

SECONDARY SELECTION FACTORS

Secondary factor 1. The quality of the Offeror's proposal to conduct its operations in a manner that furthers the protection, conservation and preservation of park area and other resources through environmental management programs and activities, including, without limitation, energy conservation, waste reduction, and recycling.

Secondary factor 2. The quality of the Offeror's proposal to provide needed employee housing and to adaptively convert existing housing to guest lodging.

Secondary factor 3. The quality of the Offeror's proposal to conduct its hiring, training and retention program for employees in such a way that furthers its ability to provide exemplary customer service beyond the basic requirements of the draft contract.

APPENDICES

1. National Park Service and Its Mission; Concession Program Management

2. Public Law 105-391 Title IV: National Park Service Concessions Management Improvement Act of 1998.
3. 36 CFR, Part 51: Concession Management Regulations.
4. 2001 NPS Management Policies, Chapter 10: Commercial Visitor Services.
5. Park Visitation
6. 2000 Approved Rates
7. Sample Operating Schedule
8. Concessioner's Financial Information
9. Existing Contract
10. Agreement for Determining the Value of the Possessory Interest in Certain Improvements under NPS Concession Contract No. CC-GRCA001-69; Statement of Value
11. Reclaimed Water Agreement
12. Changes in Insurance Requirements.
13. Utility Expense
14. Personal Property List.
15. Underground Storage Tanks
16. Grand Canyon Project Review Process; Grand Canyon National Park Construction Policies
17. XXX form
18. Tank Project Check List
19. Draft Grand Canyon National Park Government Housing Policy Statement
20. Grand Canyon Hazardous Waste Management Plan
21. Community Recreation Center Special Use Permit
22. Special Rules for Management and Operation of Concessioner Operated Trailer Villages
23. Grand Canyon National Park map brochures and newspaper

* * *

BUSINESS OPPORTUNITY

South Rim Accommodations, Facilities and Services
CC-GRCA001-01

This Prospectus describes the existing business and the business opportunity to operate Accommodations, Facilities and Services on the South Rim and at Phantom Ranch in Grand Canyon National Park in general terms. Potential Offerors are responsible for reviewing all sections of this prospectus and specifically the terms and conditions of the attached Draft Contract, including its exhibits, to determine the full scope of a concessioner's responsibilities under the new contract.

All interested parties must apply using the guidelines in the Proposal Instructions and Package.

CURRENT OPERATIONS

All facilities and services to be authorized by the National Park Service (NPS) under this contract are located on the South Rim of Grand Canyon National Park.

Grand Canyon National Park is a World Heritage Site. Grand Canyon National Park attracts 4.5 to 4.9 million visitors a year, with most visitation occurring from March to October. Visitation ranges from over 150,000 to 650,000 per month. Approximately 40% of the park's visitors are from outside the United States, from locations around the world.

The National Park Service has determined that certain visitor services and facilities are necessary and appropriate to enhance visitors' enjoyment of the park, while ensuring that resources are protected. A number of major concession contracts currently exist in Grand Canyon National Park, of which this is the largest:

- Amfac Resorts, LLC, dba Grand Canyon National Park Lodges, provides overnight lodging, food service, transportation, gift shops, public showers, public

laundries, kennels, a service station and mule operations on the South Rim and at Phantom Ranch.

- TW Recreational Services, Inc., a subsidiary of Amfac Parks and Resorts, Inc., provides overnight lodging, food service and gift shops on the North Rim.
- Delaware North Parks Services operates Canyon Village Marketplace, a general store including groceries, camping supplies and deli, on the South Rim.
- Verkamps, Inc. provides a gift shop on the South Rim.
- Grand Canyon Trail Rides provides guided mule and horse rides on and from the North Rim.
- A number of concessioners provide guided river running trips on the Colorado River.

In addition, approximately 350 operators provide road tours, guided backpacking, guided day hikes, outfitting, locksmith services and horseback rides under other authorizations.

Staffing at Peak Season

- National Park Service staff consists of approximately 325 full-time employees, and 100 less-than-full-time and seasonal employees.
- Amfac Resorts, LLC, dba Grand Canyon National Park Lodges, has approximately 900 full-time staff and 300 seasonal employees.
- In total, approximately 2500 people live year-round, and another 1000 live seasonally, on the South Rim of the Grand Canyon. In addition, about 500 more people live in the gateway community of Tusayan.

National Park Service and Amfac Resorts, LLC administrative offices are located on the South Rim of Grand Canyon National Park. Year-round services include a K-12 school, medical clinic, post office, bank, general store, church, day care and recreation center.

Many permanent employees reside in the village year-round. Housing in gateway communities is extremely limited. The closest communities with viable housing markets are Williams, Arizona, 60 miles away, and Flagstaff, Arizona, 85 miles away.

The Current Contract

The current contract expires on December 31, 2001. The Director, pursuant to 36 CFR Part 51, has determined that this is not a qualified concession contract, because it is anticipated that receipts in the first year of the new contract will exceed $500,000, and the new concession contract will not solely authorize or require guide services. Therefore no preferred Offeror for this contract exists.

Facilities

The condition of the facilities varies. Additional employee housing is a critical need. The Exhibits to the Draft Contract, which are part of this document, describe the buildings and land assigned and the trails to be used.

The new concessioner will be assigned lands and facilities in Grand Canyon National Park necessary for the operation, and will be required to maintain the lands and facilities in a manner acceptable to the NPS. Specific operating and maintenance requirements are detailed in the Operating and Maintenance Plans, Exhibits B and H to the Draft Contract.

THE BUSINESS TO BE OPERATED

This business operates facilities and services for visitors to Grand Canyon National Park, principally at three developed areas along the South Rim: Hermits Rest, Grand Canyon Village, and Desert View. It also provides facilities and services at Phantom Ranch, near the Colorado River. This business also includes transportation services and mule livery.

Most of the facilities are open 7 days a week, 12 months a year.

A. Facilities and Services at Beginning of Contract

1. Overnight Accommodations

Overnight Accommodations	Number of Rooms	Lodging Type
El Tovar Hotel	78	Deluxe hotel rooms
Kachina/Thunderbird Lodges	104	Deluxe motel rooms
Bright Angel Complex	39	Rustic rooms
Bucky/Powell Motel (with and without bath)		
Historic cabins	35	Mid-scale cabins
Rim Cabins	15	Deluxe cabins
Maswik Complex		
Maswik Lodge North	160	Mid-scale motel rooms
Maswik Lodge South	90	Economy motel rooms
Maswik Quad Cabins	28	Economy cabins
Yavapai Complex		
Yavapai East	198	Mid-scale motel rooms
Yavapai West	160	Economy motel rooms
Phantom Ranch		
Cabins without bath	11	Rustic cabins
Dormitories (10-person, same gender occupancy)	4	Rustic dormitories

Rustic rooms and cabins are adequately furnished to complement their historic role in park accommodations. They have bathrooms & showers located in close proximity. Some may have private bathrooms.

Economy Rooms and Cabins are adequately furnished with average quality motel furnishings to complement park themes. They have private bathrooms.

Mid-scale accommodations are adequately furnished with above average furnishings to complement park themes. All

accommodations in this price range have private bathrooms. Daily housekeeping service is provided.

Deluxe accommodations are located in or near full service hotels or lodges and are adequately furnished with the highest quality resort-type furnishings to complement park themes. They may have small refrigerators, fireplaces or sitting rooms. Daily housekeeping service and special amenities are provided.

2. Food and Beverage Service

a. Food Service

Location	Seats	Meals served	Type of dining
El Tovar Hotel	250	B,L,D	Gourmet/Fine Dining Restaurant
Arizona Room	120	L,D	Dinner Only
Bright Angel Dining	120	B,L,D	Full Service Coffee Shop
Bright Angel Fountain	0	Snacks	Limited Snack Bar
Maswik Cafeteria	395	B,L,D	Cafeteria
Yavapai Cafeteria	475	B,L,D	Cafeteria
Phantom Ranch	44	B,D, box lunches	Rustic Family Service
Desert View Trading Post	30	B,L,D	Snack Bar
Hermits Rest	0	Snacks	Limited Snack Bar

b. Lounge Service
- El Tovar Hotel 72 seats
- Arizona Steakhouse 20 seats
- Bright Angel Lodge 80 seats
- Maswik Lodge 78 seats

c. Transportation/Visitor Information Desks
-- Bright Angel Lodge
-- Yavapai Lodge
-- Maswik Lodge

3. General Merchandise
   - El Tovar Gift Shop and News Stand
   - Bright Angel Lodge Gift Shop
   - Maswik Lodge Gift Shop
   - Yavapai Lodge Gift Shop
   - Desert View Trading Post Gift Shop
   - Desert View Watchtower Gift Shop
   - Hermits Rest Gift Shop
   - Lookout Studio Gift Shop
   - Hopi House Gift Shop
4. Transportation Services
   - Scheduled In-Park Bus Tours (to sunset when Transportation Contract is implemented)
   - Step-on Guide Services (to sunset when Transportation Contract is implemented)
   - 24-hour Taxi Service
5. Automobile Services
   - Desert View Service Station
   - 24-hour Tiltbed Towing Service with road-side repair service
   - Locksmithing services
   - 24-hour Credit Card fueling access at Desert View Service Station
6. Mule Operations
   - Plateau Point Mule Rides
   - Phantom Ranch Mule Rides
   - Transport of soft-sided luggage to and from Phantom Ranch (Duffel Service)
   - Emergency evacuation of visitors from the inner canyon by mule (Dragout Service)
7. Kennels for cats and dogs (may sunset when the Transportation Contract is implemented)
8. Camper Services
   - Laundromat

   - Showers
9. Trailer Village
   - RV campground — 70 sites
   - Long term Trailer Village for NPS, Concession and Cooperator Employees only – 86 sites
   - Long term Trailer Village for NPS, Concession and Cooperator Employees only at Pinyon Park – 39 sites
10. Off-site Reservation System for all applicable services. This system will utilize a toll-free number.
11. Other
    - Vending (as defined by NPS)
    - Interpretive Programs
    - Concierge Services
    - Pay Phones
12. Support Services
    - Employee Housing and Meals
    - Employee Shuttle
    - Community Services

Basic Financial Information

Approved rates for 2000 are located in Appendix 6. Rates to the public are subject to approval by the National Park Service, under 16 U.S.C. 5955. Rates may be changed at the request of the concessioner subject to approval by NPS under 16 U.S.C 5955.

Historically, this business has been consistent from year to year in its reported revenue. Further financial information and use rates are available in Appendix 8, Financial Information.

The Proposal Package requires Offerors to develop financial projections based upon the business to be operated and the projects required. Offerors should be appropriately cautious in the use of historical information. The National Park Ser-

vice will not provide financial predictions; therefore, Offerors are responsible for producing their own pro forma financial statements and relying on their own financial predictions.

FUTURE OPERATIONS

In August of 1995, the National Park Service completed a new General Management Plan for Grand Canyon National Park. This plan outlines significant changes that will improve and enhance visitors' enjoyment as well as their understanding of this spectacular environment. Such changes are both physical and philosophical. During the term of this contract, some of these changes will be implemented, and the concessioner's operations will be affected accordingly.

- Day visitors will enter and move about the Grand Canyon Village Area by means of new transportation and trail systems. Private vehicles will continue to be permitted on East Rim Drive and at Desert View.
- The anticipated implementation date for the transportation service change is January 1, 2004.
- A Heritage Education Campus will be established in the powerhouse area of the historic South Rim village. The concessioner will vacate its currently occupied historic structures in the heart of Grand Canyon Village, and will renovate and relocate its warehousing and maintenance functions to a complex that presently houses the park's NPS Maintenance shops, after the NPS completes construction of its new maintenance buildings (est. completion date 12/31/02). At that time, the fueling tanks currently owned by the NPS and used by the concessioner will be assigned to the concessioner.

At any time after December 31, 2004, the National Park Service may withdraw transportation and kennel services from this Contract and compete them as a separate business opportunity.

Copies of the Grand Canyon General Management Plan are available on the Internet at http://www.nps.gov/grca/gmp/-index.htm.

In addition, in its reservation system, the concessioner will implement a toll-free number. All reservation services, group sales and marketing operations will be located outside the park.

Building and Improvement Program

Particular projects are identified in Section 9 of the Draft Contract, including the timing and anticipated expenditures of each project. Each project is subject to environmental and cultural compliance.

Some facilities changes at the South Rim called for by the General Management Plan will also be realized through the requirements listed in Section 9 of this Draft Contract.

Project costs

The projects identified here in general terms represent the greater part of an Improvement Program to be carried out by the concessioner and estimated by the NPS to total approximately $8.5 million. Each Offeror should make its own determinations as to the probable cost of implementing the construction requirements identified in the Improvement Program in Section 9 of the Draft Contract.

The estimate prepared by the NPS is a "Class C" conceptual cost estimate based on square foot costs of similar construction, or on identifiable known unit costs of similar construction items. Class C estimates are usually prepared before a fully defined scope of work has been developed. They consider such factors as job location, unusual site conditions, sources of materials and supplies, and the availability and skills of local labor pools. Class C estimates are used to establish a logical expectation of the costs associated with a

future project by assessing the known costs of similar past projects.

Transportation

This Draft Contract prohibits the practice of using park lands as a base of operations for transportation services conducted outside the park, as was done in the past.

Taxi service will be permitted to serve Tusayan as well as areas within the South Rim.

Environmental Management

The new concessioner will develop, document, implement, and comply fully with a comprehensive written Environmental Management Program (EMP) to achieve Environmental Management Objectives. The initial EMP shall be developed and submitted to the Director for approval within sixty days of the effective date of the contract. A proposed updated EMP will be submitted for approval annually. (See Draft Contract, Section 6).

The annual EMP will describe how the concessioner will comply with the EMP and how the concessioner will self–assess its performance under the EMP. The self-assessment should ensure the concessioner's conformance with the Environmental Management Objectives and measure performance against environmental goals and targets. The EMP shall also describe procedures to be taken by the concessioner to correct any deficiencies identified by the self-assessment.

Utilities

Water, sewage disposal, solid waste removal and recycling are provided by the park. The NPS charges the concessioner for these services. All other utilities are provided directly by utility companies.

PROPERTY OWNERSHIP AND PURCHASE

The existing concessioner has, under the terms of its existing contract, certain rights to monetary compensation in the event it is not selected as the new concessioner for the new concession contract.

This compensation relates to possessory interest in real property improvements and to personal property of the existing concessioner, or both. The compensation for possessory interest has been fixed at $165,000,000 through binding arbitration.

It is the obligation of any Offeror selected as a new concessioner to pay the $165,000,000 possessory interest compensation to the existing concessioner in accordance with the terms of the existing contract. The existing contract is found in Appendix 9. In light of the fact that the value of the possessory interest has been determined through binding arbitration, the new concessioner will be required to compensate the existing concessioner for its possessory interest no later than December 31, 2001.

Personal Property

Any Offeror that is selected as the new concessioner is obliged to purchase certain personal property of the current concessioner, under the provisions of the existing contract, which is included in Appendix 9.

Offerors are solely responsible for ascertaining the personal property which must be purchased and its condition. The purchase price of personal property must be estimated by the offeror. The fact that the final purchase price may be greater than estimated by an offeror will not be grounds for adjustment of the terms of the contract or other relief to the new concessioner.

Estimate of Value

The value of the existing concessioner's personal property and equipment is estimated by the NPS to be approximately $9,000,000.

EFFECTIVE DATE OF NEW CONTRACT

The effective date of the new contract will be January 1, 2002.

FRANCHISE FEES

The minimum franchise fee for the new contract is 3.8% of annual gross receipts. However, Offerors may propose a higher minimum franchise fee in accordance with the terms of the prospectus.

SITE VISITS

If an on-site tour of the facilities is desired, it will be conducted on May 15, 2001. Such requests should be directed to Ms. Laura Shearin no later than May 1, 2001: (520) 226-0169.

Refer to Appendix 1 for an explanation of the NPS concession management system and practices.

THE PARK AREA AND ITS MISSION

South Rim Accommodations, Facilities & Services
CC-GRCA001-01

DESCRIPTION OF PARK

Grand Canyon National Park is located in the northwest corner of the State of Arizona in Coconino County, encompassing approximately 1,218,375 acres of public land on the southern end of the Colorado Plateau. Its scenic vistas attract visitors from all over the world.

A 277-mile stretch of the Colorado River runs through the park. The exposed geologic strata of the canyon rise over a mile above the river, providing one of the world's most complete records of geological history.

The elevational diversity of Grand Canyon results in significant climatic variations and biological diversity, reflected in life zones ranging from the arid lower Sonoran Desert to those typical of forested regions in Canada. Steep canyon walls admit limited sunshine to the canyon's floor during the winter, giving cold nights and cool days. Spring and fall feature cool nights and mild days. Summer nights are warm, while days are hot, usually well over 100 degrees Fahrenheit. Except for seasonal thunderstorms, usually in July and August, the area is very dry. Snowfall is occasionally recorded in the winter.

The South Rim of the Grand Canyon attracts visitors yearround, although most visitation occurs from March to October. Visitors to the Grand Canyon come from all over the world, with substantial numbers of visitors from Japan, Germany, and France.

Almost five million recreational visits are recorded in the park each year, primarily on the South Rim. The public has traditionally used the park for sightseeing, hiking, river rafting, camping, touring, and general recreation. The scientific

community has also utilized the park extensively for many fields of research.

In recognition of its globally significant values, Grand Canyon National Park has been designated as a World Heritage Site.

Park Headquarters Location

Park Headquarters is located in the community of Grand Canyon, Arizona, on the park's South Rim, 60 miles west of Cameron, Arizona, via Arizona State Route 64; 60 miles north of Williams, Arizona, via Arizona State Route 64; and 85 miles northwest of Flagstaff, Arizona, via U.S. Highway 180.

Legislated Purpose and Significance of Park

On January 11, 1908, President Theodore Roosevelt reserved land in the Grand Canyon of Arizona as the Grand Canyon National Monument by presidential proclamation. In his proclamation, President Roosevelt stated that the Grand Canyon of Arizona "is an object of unusual scientific interest, being the greatest eroded canyon in the United States, and it appears that the public interest would be promoted by reserving it as a National Monument" (Proclamation No. 794).

On February 26, 1919, Congress dedicated and set apart Grand Canyon National Park "as a public park for the benefit and enjoyment of the people" (Grand Canyon National Park Establishment Act, 40 Stat 1175).

Over the years the park has been enlarged and its boundaries revised, most recently on January 3, 1975, when Congress recognized "that the entire Grand Canyon, from the mouth of the Paria River to the Grand Wash Cliffs, including tributary side canyons and surrounding plateaus, is a natural feature of national and international significance" (Grand Canyon National Park Enlargement Act, Public Law 93-620). In this act, Congress also recognized the need for "further protection and

interpretation of the Grand Canyon in accordance with its true significance."

These legislative statements, in addition to the NPS Organic Act, as amended, effectively provide the foundation upon which park management is based. Management seeks to protect the natural and cultural resources of the park, while providing for "the benefit and enjoyment of the people" through resource-based interpretive programs and appropriate public and concessions facilities.

Compliance with Federal, State, and Local Laws and Park Jurisdiction

Grand Canyon National Park operates under the jurisdiction of the federal government. The park has concurrent jurisdiction with the State of Arizona.

Law enforcement is conducted by National Park Service (NPS) Rangers holding federal law enforcement commissions. These officers enforce Federal and state laws through the Act of June 25, 1948, the Assimilative Crimes Act. County and state law enforcement officers enter the park to enforce local and state law. The park has a memorandum of understanding, describing these law enforcement and mutual aid relationships, with the neighboring police department

Public health codes are prescribed by the United States Public Health Service (USPHS), and inspections are conducted in accordance with those codes. The USPHS inspects and supervises the operation of the park's water supply and sewage disposal systems.

National building codes apply to all construction and rehabilitation projects, except where state code is more stringent, in which case state code is applied. Construction may be undertaken only after the NPS issues a letter or permit to proceed and approves the plans involved.

Although operations are conducted on federal property, the concessioner is subject to state and local laws and ordinances in the same manner as if it operated outside of the federal holding. Business permits normally required must be secured, and taxes normally payable must be paid.

Fire Protection

Fire protection is provided to in-park structures by a volunteer fire department composed of NPS, concessioner and cooperator members under NPS direction. Amfac Resorts, LLC has maintained its own fire engine as part of that system. Grand Canyon National Park and Amfac Resorts, LLC work together to provide fire suppression to park structures.

Park Management Structure

Grand Canyon National Park is administered by its Superintendent, who is assisted by a staff of approximately 325 permanent and 100 seasonal personnel.

Many issues can be reviewed and decided at the park level; others, however, require review and/or approval at the regional or Washington level, and some require a process of public review prior to decision.

The Superintendent manages the total park operation, including concession operations. The Superintendent carries out the policies and directives of the NPS, including management of concessioners. Through NPS representatives, the Superintendent reviews, supervises, and coordinates concession activities related to Grand Canyon National Park.

Monitoring concession contract compliance includes oversight of all aspects of the concessioner's activities, including, without limitation, evaluating all concession operations and services, reviewing business operations, reviewing and authorizing all rates and operating seasons/hours, improvements to facilities, and construction.

The Management Assistant coordinates legislative and congressional affairs, partnerships and public affairs. The Public Information Officer, who works for the Management Assistant, coordinates public affairs, special events, VIP visits, informational briefings, and directs the park's commercial filming program. Both coordinate activities directly with the Concessioner.

The Chief, Concessions Program Management, (Chief) coordinates the functions of other NPS divisions relating to concession operations. The Chief makes recommendations on all aspects of the Concessioner's operation to the Superintendent. The Chief ensures necessary evaluations and inspections are performed, including those required by the United States Public Health Service (USPHS), Park Risk Management Officer, Structural Fire Program, Environmental Management Program and the Concessioner Review Program. The Chief ensures all Concessioner rates are approved based upon current comparability studies or applicable guidelines. The Chief acts as liaison between the Concessioner and Superintendent.

To support the Chief, Concessions Program Management, Concessions Management Specialists review and coordinate the Concessioner's day-to-day activities. They develop prospectuses and contracts. They review and evaluate operational and maintenance activities; rate, service, and schedule changes; equal employment opportunity and affirmative action plans; advertisements; construction proposals; environmental management; annual financial reports; insurance coverage; and any other contract requirements.

The Park Sanitarian monitors food and beverage services, grocery stores, solid waste disposal, water, and waste water systems to ensure adherence to all applicable public health standards.

The Deputy Superintendent supervises and manages the functions of all divisions except concessions, as they relate to the overall park operation.

The Park Risk Management Officer monitors the Concessioner's Risk Management Program to ensure it meets all applicable standards, and conducts an annual review of the Risk Management program.

The Chief Ranger initiates, reviews, supervises, and coordinates the activities of personnel who provide visitor protection functions.

District Rangers and Branch Chiefs serve as the direct line of communication to the Concessioner on matters related to fire management, law enforcement, risk management, prescribed fire, search and rescue, emergency medical services and resource protection. Division personnel may assist with concession operational evaluations and critical item follow-ups.

The Chief of Interpretation acts on behalf of the Superintendent in matters pertaining to interpretation and environmental education. The Interpretive Division works with the Concessions Management Division to evaluate/monitor and provide training as appropriate to Concessioner interpretive activities.

The Chief of Maintenance and Engineering acts on behalf of the Superintendent in matters pertaining to maintenance and supervises the activities of facility managers. The Chief of Maintenance acts on behalf of the Superintendent in matters pertaining to compliance with Applicable Environmental Laws.

Facility Managers and Maintenance Supervisors provide day-to-day supervision over all maintenance activities and operations, including utilities and hazard tree mitigation. They serve as the direct line of communications to the Concessioner on routine maintenance matters.

The Park Architect works directly with the Concessioner on historic preservation, rehabilitation of historic structures and all other construction/design/compliance matters in the park.

The Director of the Science Center acts on behalf of the Superintendent in all matters pertaining to natural and cultural resources management such as air quality monitoring, vegetation management, fish and wildlife management, etc.

The Park Compliance Officer works directly with the Concessioner to ensure compliance with natural, cultural and resource protection requirements.

The Park Curator serves as direct line of communication to the Concessioner about care, treatment and preservation of historic furnishings, decorative arts, etc.

The Chief of Administration acts on behalf of the Superintendent in matters related to fiscal management associated with the Concessioner activities, including billing for payment of franchise fees, utilities, lease fees, quarters rental, and personal services provided by the NPS to the Concessioner.

The Implementation Team Manager acts on behalf of the Superintendent in all matters pertaining to implementation of the General Management Plan, which includes scheduling, planning, review of site plans, design, construction, razing of buildings and restoration. The Team Manager has direct communication with the Concessioner on these matters.

Park Interpretive Themes and Goals

The mission of interpretation is to increase visitor understanding and appreciation of the significance of park resources. Interpretive services provide opportunities for people to forge their own intellectual and emotional connections to the ideas and meanings inherent in the resources of the park.

It is the goal of interpretation that park visitors and the general public understand and appreciate the preservation of parks and their resources for this and future generations.

Primary Parkwide Interpretive Themes for
Grand Canyon National Park

A. The immense and colorful Grand Canyon is valued worldwide as one of Earth's most powerful and inspiring scenic landscapes, offering people enriching opportunities to explore and experience its wild beauty in both vast and intimate spaces.

B. Water is the lifeblood of Grand Canyon—a force of erosion, a sustainer of scarce riparian habitat in a desert environment, a spiritual element for native peoples, a provider of recreation, and a central factor in the exploration, development, and politics of the American West.

C. The Colorado River and erosional forces sculpted the southern edge of the Colorado Plateau to form the Grand Canyon, revealing a beautiful sequence of rock layers that serve as windows into time.

D. Extreme changes in elevation, exposure, and climate in the Grand Canyon support a remarkable range of biotic communities in unusual proximity; a relatively undisturbed ecosystem that allows natural processes to continue, providing sanctuary for present and future life.

E. Grand Canyon remains a homeland and a sacred place to a number of American Indian cultures, a point of emergence to some, offering us an opportunity to consider the powerful and spiritual ties between people and place.

F. Grand Canyon has sustained people materially and spiritually for thousands of years—wider recognition of its value led to its designation as a national park and world heritage site; however, continuing threats to its preservation generate dialogue about our need and responsibility to conserve our local and global environment.

PARK PLANNING DOCUMENTS AND PLANNED IMPROVEMENTS.

Recognizing that increasing visitation was producing strains on park infrastructure and resources, the National Park Service finalized a General Management Plan for Grand Canyon National Park in 1995. This plan is available in its entirety at http://www.nps.gov/grca/gmp/index.htm.

In its objectives for Grand Canyon National Park, the General Management Plan listed the following as desired conditions to be achieved:

International Significance

- Manage the park to preserve its integrity as a world heritage site with natural and cultural resources of national and international significance.

Natural and Cultural Resources

- Preserve, protect, and interpret the park's natural and scenic resources and values, and its ecological processes.
- Preserve, manage, and interpret park cultural resources (archeological, ethnographic, architectural, and historic resources, trails, and cultural landscapes) for the benefit of present and future generations.
- Preserve, protect, and improve air quality and related values such as visibility.
- Manage visitor use, development, and support services to protect the park's resources and values.
- Preserve and protect the genetic integrity and species composition within the park, consistent with natural ecosystem processes.
- To the maximum extent possible, restore altered ecosystems to their natural conditions. In managing naturalized ecosystems, ensure the preservation of native components

through the active management of nonnative components and processes.

- Manage ecosystems to preserve critical processes and linkages that ensure the preservation of rare, endemic, and specially protected (threatened/endangered) plant and animal species.
- Protect the natural quiet and solitude of the park, and mitigate or eliminate the effects of activities causing excessive or unnecessary noise in, over, or adjacent to the park.
- Preserve natural spring and stream flows and water quality. Withdraw only the minimum water necessary to meet park purposes. To the maximum extent feasible, strive to meet increases in water demand by conserving and reusing water.
- Provide opportunities for scientific study and research focused on the Grand Canyon, consistent with resource protection and park purposes.
- Inventory, monitor, and maintain data on park natural and cultural resources and values, and utilize this information in the most effective ways possible to facilitate park management decisions to better preserve the park.
- Clearly delineate and maintain the park boundary to protect park resources and values.
- Identify and evaluate all cultural properties within the park for inclusion on the National Register of Historic Places.
- Collect ethnographic data and develop ethnohistories for the Havasupai, Hopi, Hualapai, Navajo, Southern Paiute, and Zuni peoples concerning their associations with the Grand Canyon, as appropriate, in order to preserve, protect, and interpret park resources and values important to diverse American Indian cultures, including significant, sacred, and traditional use areas.

Wilderness and Wild River Management

- Manage areas meeting the criteria for wilderness designation as wilderness. Actively pursue the designation of these lands as part of the national wilderness preservation system.
- Manage the Colorado River corridor through Grand Canyon National Park to protect and preserve the resource in a wild and primitive condition. Actively pursue the designation of eligible segments of the Colorado River and its tributaries as part of the national wild and scenic rivers system.

Visitor Experience

- Provide a diverse range of quality visitor experiences, as appropriate, based on the resources and values of the Grand Canyon, compatible with the protection of those resources and values.
- Provide access that is appropriate and consistent with the character and nature of each landscape unit and the desired visitor experience.
- Consistent with park purposes and the characteristics of each landscape unit, preserve and protect the maximum opportunities in every landscape unit of the park for visitors to experience the solitude, natural conditions, primitiveness, remoteness, and inspirational value of the Grand Canyon.
- Provide equal access to programs, activities, experiences, and recreational opportunities for individuals with disabilities, as appropriate and consistent with the levels of development and inherent levels of access in areas within the park.
- Provide a wide range of interpretive opportunities and information services to best assist, inform, educate, and challenge visitors.

- Educate and influence the public through positive action to preserve and protect the world they live in, including but not limited to the park.
- Provide a safe, efficient, and environmentally sensitive transportation system for visitors, employees, and residents, consistent with management zoning and resource considerations. Emphasize nonmotorized modes of transportation wherever feasible.
- Develop visitor use management strategies to enhance the visitor experience while minimizing crowding, conflicts, and resource impacts.
- Provide visitor and employee facilities and services, as necessary and appropriate, in or adjacent to areas dedicated to those uses or in appropriate disturbed areas.

Facility Design

- Consistent with its purpose, strive to make Grand Canyon National Park a model of excellence in sustainable design and management through such means as energy efficiency, conservation, compatibility with historic setting and architecture, recycling, accessibility, and the use of alternative energy sources.
- Encourage appropriate use and adaptive reuse of historic structures, while preserving historic integrity.
- Ensure that development and facilities within the park are necessary for park purposes.
- Design high-quality facilities that exemplify visual consistency and appropriateness.
- Ensure that park developments and operations do not adversely affect park resources and environments, except where absolutely necessary to provide reasonable visitor access and experiences.

Regional Issues

- Understand, assess, and consider the effects of park decisions outside the park as well as inside.

- Upon request, work cooperatively to assist local American Indians in planning, developing, and managing lands adjoining the park in a mutually compatible manner.
- Work cooperatively with appropriate entities to encourage compatible, aesthetic, and planned development and recreational opportunities outside park boundaries, and to provide information, orientation, and services to visitors.
- Carry the NPS concern for the environment beyond the boundaries of the park, including the protection of park resources and values from external influences.

South Rim Management Objectives

The South Rim is considered to be bounded on the west by Hermits Rest, on the east by Desert View, on the north by the canyon rim, and on the south by the park boundary. The following objectives for the South Rim are in addition to the overall park objectives.

Visitor Experience

- Identify and develop an appropriate range of visitor experiences, opportunities, and access that will accommodate a variety of visitor expectations, abilities, and commitment levels.
- Provide viewing opportunities of the canyon, access to views and trails, and interpretation and information, recognizing that these are the most important elements of the visitor experience on the South Rim.
- Maintain the South Rim from Hermits Rest to Desert View as the focus for the majority of visitor use in the park, including major visitor facilities and accommodations.

Cultural Resources

- Utilize the extensive cultural resources of the South Rim as a strong component of the interpretive program, including the interpretation of American Indian cultures.

Development

- Develop and promote the use of foot trails, bicycle paths, and public transportation to provide convenient and efficient movement of visitors, employees, and residents within Grand Canyon Village and between major points of interest.
- Maintain and enhance the meandering, rural character of West Rim and East Rim Drives, including the feeling that one is removed from the developments of Grand Canyon Village and Desert View. Maintain the existing large undisturbed areas along West Rim Drive.

Significant Changes Proposed in the General Management Plan

Substantial changes in the transportation system were proposed. Although vehicle restrictions are planned, no limit on the number of visitors is anticipated for the life of the General Management Plan (to the year 2010).

The General Management Plan proposes the following changes for the South Rim of Grand Canyon National Park:

- A transit system will provide transportation for all day visitors to the village area of the South Rim of the Grand Canyon within the term of this contract. Overnight visitors to lodges on the South Rim (except for Yavapai) will park at the Maswik Transportation Center and be shuttled to their lodges. Yavapai overnight visitors will park in the Yavapai area.
- A new visitor information center—the Canyon View Information Plaza—opened in the fall of 2000, and will be a primary hub for the transit system.
- In addition to the expanded transit system, a greenway trail system for pedestrians and bicyclists is proposed from Hermits Rest to Desert View and from the Canyon View Information Plaza to Tusayan.

- The National Park Service will build a new warehouse and maintenance facility for its operations. This project has an estimated completion date of 11/1/02. Administrative and maintenance facilities for the South Rim concessioner will then be relocated to the current National Park Service facilities.
- A "Heritage Education Center" will be established in the historic district, using the historic powerhouse, mule barn, laundry, and other buildings. Five dormitories located in the Village area may be converted to economy lodging.

PARK MANAGEMENT OBJECTIVES FOR CONCESSION SERVICES

The need for commercial visitor services in Grand Canyon National Park is based on objectives for visitor use described in law, planning documents that exist for the park, and the judgment of management considering the way the park is currently used and the present objectives of the NPS.

The NPS has determined that the facilities and services that are called for in this Prospectus are necessary and appropriate to the purposes of Grand Canyon National Park.

UNITED STATES DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE

Grand Canyon National Park

South Rim
Accommodations, Facilities and Services

CONCESSION CONTRACT
NUMBER CC-GRCA001-01

_____

[Name of Concessioner]

_____

_____

[Address, including email address and phone number]

Doing Business As

_____

Covering the Period

January 1, 2002 through **December 31, 2011**

CONCESSION CONTRACT
TABLE OF CONTENTS

IDENTIFICATION OF THE PARTIES

SEC. 1 **TERM OF CONTRACT**

SEC. 2 **DEFINITIONS**

SEC. 3 **SERVICES AND OPERATIONS**
- a. Required and Authorized Visitor Services
- b. Operation and Quality of Operation
- c. Operating Plan
- d. Merchandise and Services
- e. Rates
- f. Impartiality as to Rates and Services

SEC. 4. **CONCESSIONER PERSONNEL**
- a. Employees
- b. Employee Housing and Recreation

SEC. 5. **LEGAL, REGULATORY, AND POLICY COMPLIANCE**
- a. Legal, Regulatory, and Policy Compliance
- b. Notice
- c. How and Where to Send Notice

SEC. 6. **ENVIRONMENTAL AND CULTURAL PROTECTION**
- a. Environmental Management Objectives
- b. Environmental Management Program
- c. Environmental Management Measurement
- d. Environmental Data, Reports, Notifications, and Approvals
- e. Corrective Action
- f. Indemnification and Cost Recovery for Concessioner Environmental Activities
- g. Weed and Pest Management
- h. Protection of Cultural and Archaeological Resources

SEC. 7 **INTERPRETATION OF AREA RESOURCES**
- a. Concessioner Obligations
- b. Director Review of Content

SEC. 8. **CONCESSION FACILITIES USED IN OPERATION BY CONCESSIONER**
- a. Assignment of Concession Facilities
- b. Concession Facilities Withdrawals
- c. Effect of Withdrawal
- d. Right of Entry
- e. Personal Property and Historic Personal Property
- f. Condition of Concession Facilities
- g. Utilities Provided by the Director
- h. Utilities Not Provided by the Director

SEC. 9. **CONSTRUCTION OR INSTALLATION OF REAL PROPERTY IMPROVEMENTS**
- a. Construction of Real Property Improvements
- b. Removal of Real Property Improvements
- c. Leasehold Surrender Interest
- d. Concession Facilities Improvement Program

SEC. 10. **MAINTENANCE**
- a. Maintenance Obligation
- b. Maintenance Plan
- c. Repair and Maintenance Reserve
- d. General Maintenance Reserve

SEC. 11. **FEES**
- a. Franchise Fee
- b. Payments Due
- c. Interest
- d. Adjustment of Franchise Fee

SEC. 12. **INDEMNIFICATION AND INSURANCE**
- a. Indemnification
- b. Insurance in General
- c. Commercial Public Liability
- d. Property Insurance

SEC. 13 **BONDS AND LIENS**
- a. Bonds
- b. Lien

SEC. 14. **ACCOUNTING RECORDS AND REPORTS**
- a. Accounting System
- b. Annual Financial Report
- c. Other Financial Reports

SEC. 15 **OTHER REPORTING REQUIREMENTS**
- a. Insurance Certification
- b. Environmental Reporting
- c. Miscellaneous Reports and Data.

SEC. 16. **SUSPENSION, TERMINATION, OR EXPIRATION**
- a. Suspension
- b. Termination
- c. Notice of Bankruptcy or Insolvency
- d. Requirements in the Event of Termination or Expiration

SEC. 17. **COMPENSATION**
- a. Just Compensation
- b. Compensation for Contract Expiration or Termination
- c. Procedures for Establishing the Value of a Leasehold Surrender Interest
- d. Compensation for Personal Property
- e. Compensation for Historic Personal Property

SEC. 18. **ASSIGNMENT, SALE OR ENCUMBRANCE OF INTERESTS**

SEC. 19. **GENERAL PROVISIONS**

EXHIBITS

EXHIBIT A: Leasehold Surrender Interest
EXHIBIT B: Operating Plan
EXHIBIT C: Nondiscrimination.
EXHIBIT D: Assigned Land, Real Property Improvements
EXHIBIT E: Assigned Government Personal Property and Historic Personal Property
EXHIBIT F: Concessioner Construction, Major Rehabilitation, and Repair and Maintenance Project Procedures
EXHIBIT G: Leasehold Surrender Interest
EXHIBIT H: Maintenance Plan
EXHIBIT I: Insurance Requirements
EXHIBIT J: Historic Personal Property

[CORPORATION]

THIS CONTRACT is made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the Intermountain Region, (hereinafter referred to as the "Director"), and _____, a corporation organized and existing under the laws of the State of_____ (hereinafter referred to as the "Concessioner"):

[PARTNERSHIP]

THIS CONTRACT is made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the Intermountain Region, hereinafter referred to as the "Director", and _____, a partnership organized under the laws of the State of_____ , hereinafter referred to as the "Concessioner":

[SOLE PROPRIETORSHIP]

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Director of the National Park Service, through the Regional Director of the Intermountain Region, hereinafter referred to as the "Director," and, _____, an individual, doing business as _____, hereinafter referred to as the "Concessioner":

W I T N E S S E T H:

THAT WHEREAS, Grand Canyon National Park is administered by the Director as a unit of the National Park System to conserve the scenery and the natural and historic objects and the wildlife therein, and to provide for the public enjoyment of the same in such manner as will leave such Area unimpaired for the enjoyment of future generations; and

WHEREAS, to accomplish these purposes, the Director has determined that certain visitor services are necessary and appropriate for the public use and enjoyment of the Area and should be provided for the public visiting the Area; and

WHEREAS, the Director desires the Concessioner to establish and operate these visitor services at reasonable rates under the supervision and regulation of the Director; and

WHEREAS, the Director desires the Concessioner to conduct these visitor services in a manner that demonstrates sound environmental management, stewardship, and leadership;

NOW, THEREFORE, pursuant to the authority contained in the Acts of August 25, 1916 (16 U.S.C. 1, 2-4), and November 13, 1998 (Public Law 105-391), and other laws that supplement and amend the Acts, the Director and the Concessioner agree as follows:

SEC. 1. TERM OF CONTRACT

This Concession Contract No. CC-GRCA001-01 ("CONTRACT") shall be effective as of January 1, 2002, and shall be for the term of 10 (ten) years until its expiration on December 31, 2011.

SEC. 2. DEFINITIONS

The following terms used in this CONTRACT will have the following meanings, which apply to both the singular and the plural forms of the defined terms:

(a) "Applicable Laws" means the laws of Congress governing the Area, including, but not limited to, the rules, regulations, requirements and policies promulgated under those laws (e.g., 36 CFR Part 51), whether now in force, or amended, enacted or promulgated in the future, including, without limitation, Federal, state and local laws, rules, regulations, requirements and policies governing nondiscrimina-

tion, protection of the environment and protection of public health and safety.

(b) "Area" means the property within the boundaries of Grand Canyon National Park.

(c) "Best Management Practices" or "BMPs" are policies and practices that apply the most current and advanced means and technologies available to the Concessioner to undertake and maintain a superior level of environmental performance reasonable in light of the circumstances of the operations conducted under this CONTRACT. BMPs are expected to change from time to time as technology evolves with a goal of sustainability of the Concessioner's operations. Sustainability of operations refers to operations that have a restorative or net positive impact on the environment.

(d) "Capital Improvement" shall have the meaning set forth in Exhibit A to this CONTRACT.

(e) "Concession Facilities" shall mean all Area lands assigned to the Concessioner under this CONTRACT and all Real Property improvements assigned to or constructed by the Concessioner under this CONTRACT. The United States retains title and ownership to all Concession Facilities.

(f) "Days" shall mean calendar days.

(g) "Director" means the Director of the National Park Service, acting on behalf of the Secretary of the Interior and the United States, and his duly authorized representatives.

(h) "Exhibit" or "Exhibits" shall mean the various exhibits, which are attached to this CONTRACT, each of which is hereby made a part of this CONTRACT.

(i) "Gross receipts" means the total amount received or realized by, or accruing to, the Concessioner from all sales for cash or credit, of services, accommodations, materials, and other merchandise made pursuant to the rights granted by this CONTRACT, including gross receipts of subconcessioners

as herein defined, commissions earned on contracts or agreements with other persons or companies operating in the Area, and gross receipts earned from electronic media sales, but excluding:

(1) intracompany earnings on account of charges to other departments of the operation (such as laundry);

(2) charges for employees' meals, lodgings, and transportation;

(3) cash discounts on purchases;

(4) cash discounts on sales;

(5) returned sales and allowances;

(6) interest on money loaned or in bank accounts;

(7) income from investments;

(8) income from subsidiary companies outside of the Area;

(9) sale of property other than that purchased in the regular course of business for the purpose of resale;

(10) sales and excise taxes that are added as separate charges to sales prices, gasoline taxes, fishing license fees, and postage stamps, provided that the amount excluded shall not exceed the amount actually due or paid government agencies;

(11) receipts from the sale of handicrafts that have been approved for sale by the Director as constituting authentic American Indian, Alaskan Native, Native Samoan, or Native Hawaiian handicrafts.

All monies paid into coin operated devices, except telephones, whether provided by the Concessioner or by others, shall be included in gross receipts. However, only revenues actually received by the Concessioner from coin-operated telephones shall be included in gross receipts. All revenues

received from charges for in-room telephone or computer access shall be included in gross receipts.

(j) "Gross receipts of subconcessioners" means the total amount received or realized by, or accruing to, subconcessioners from all sources, as a result of the exercise of the rights conferred by a subconcession contract. A subconcessioner will report all of its gross receipts to the Concessioner without allowances, exclusions, or deductions of any kind or nature.

(k) "Leasehold Surrender Interest" shall have the meaning set forth in Exhibit A to this CONTRACT.

(l) "Leasehold Surrender Interest Value" or the "value" of a Leasehold Surrender Interest shall have the meaning set forth in Exhibit A to this CONTRACT.

(m) "Major Rehabilitation" shall have the meaning set forth in Exhibit A to this CONTRACT.

(n) "Possessory Interest" shall have the meaning set forth in Exhibit A to this CONTRACT.

(o) "Real Property Improvements" shall have the meaning set forth in Exhibit A to this CONTRACT.

(p) "Historic Personal Property" is certain personal property owned by the Concessioner that is intrinsic to the historic and cultural values of the area and related concession operations. Some items are, in themselves, artistic, historic or cultural artifacts.

(q) "Subconcessioner" means a third party that, with the approval of the Director, has been granted by a concessioner rights to operate under a concession contract (or any portion thereof), whether in consideration of a percentage of revenues or otherwise.

(r) "Superintendent" means the manager of the Area.

(s) "Visitor Services" means the accommodations, facilities and services that the Concessioner is required and/or authorized to provide by Section 3(a) of this CONTRACT.

SEC. 3. SERVICES AND OPERATIONS

(a) Required and Authorized Visitor Services

During the term of this Contract, the Director requires and authorizes the Concessioner to provide the following visitor services for the public within the Area:

(1) Required Visitor Services: The Concessioner is required to provide the following visitor services during the term of this Contract:

1. Overnight Accommodations	Number of Rooms	Lodging Type
El Tovar Hotel	78	Deluxe hotel rooms
Kachina/Thunderbird Lodges	104	Deluxe motel rooms
Bright Angel Complex	39	Rustic rooms
Bucky/Powell Motel (with and without bath)		
Historic cabins	35	Mid-scale cabins
Rim Cabins	15	Deluxe cabins
Maswik Complex		
Maswik Lodge North	160	Mid-scale motel rooms
Maswik Lodge South	90	Economy motel rooms
Maswik Quad Cabins	28	Economy cabins
Yavapai Complex		
Yavapai East	198	Mid-scale motel rooms
Yavapai West	160	Economy motel rooms
Phantom Ranch		
Cabins without bath	11	Rustic
Dormitories (10-person, same gender occupancy)	4	Rustic

2. Food and Beverage Service

a. Food Service

Location	Seats	Meals served	Type of dining
El Tovar Hotel	250	B,L,D	Gourmet/Fine Dining Restaurant
Arizona Room	120	L,D	Restaurant
Bright Angel Dining	120	B,L,D	Full Service Coffee Shop
Bright Angel Fountain	0	Snacks	Limited Snack Bar
Maswik Cafeteria	395	B,L,D	Cafeteria
Yavapai Cafeteria	475	B,L,D	Cafeteria
Phantom Ranch	44	B,D, box lunches	Rustic Family Service
Desert View Trading Post	30	B,L,D	Snack Bar
Hermits Rest	0	Snacks	Limited Snack Bar

b. Lounge Service
- El Tovar Hotel 72 seats
- Arizona Room 20 seats
- Bright Angel Lodge 80 seats
- Maswik Lodge 78 seats

c. Transportation/Visitor Information Desks
- Bright Angel Lodge
- Yavapai Lodge
- Maswik Lodge

d. Concierge Services
- El Tovar

3. General Merchandise
- El Tovar Gift Shop and News Stand
- Bright Angel Lodge Gift Shop
- Maswik Lodge Gift Shop
- Yavapai Lodge Gift Shop
- Desert View Trading Post Gift Shop
- Desert View Watchtower Gift Shop

- Hermits Rest Gift Shop
- Lookout Studio Gift Shop
- Hopi House Gift Shop

4. Transportation Services
- Scheduled Bus Tours
- Step-on Guide Services
- 24-hour Taxi Service within South Rim and Tusayan.

5. Automobile Services
- Desert View Service Station
- 24-hour Tiltbed Towing Service with road-side repair service
- Locksmithing services
- 24-hour Credit Card fueling access at Desert View Service Station

6. Mule Operations
- Plateau Point Mule Rides
- Phantom Ranch Mule Rides
- Duffel Service: Transport of soft-sided luggage to and from Phantom Ranch
- Dragout Service: Emergency evacuation of visitors from the inner canyon by mule

7. Kennels for cats and dogs

8. Camper Services
- Laundromat
- Showers

9. Trailer Village
- RV campground — 70 sites

10. Reservation System. In its reservation system, the concessioner will implement a toll-free number.

11. Other
- Limited Vending
- Interpretive Programs

- Community Support
- Pay Phones

At any time after December 31, 2003, the National Park Service intends to withdraw transportation and kennel services from this Contract, upon reasonable notice to the Concessioner, and compete them as a separate business opportunity.

(b) Operation and Quality of Operation

(1) The Concessioner shall provide, operate and maintain the required and authorized visitor services and any related support facilities and services in accordance with this CONTRACT to such an extent and in a manner considered satisfactory by the Director. Except for any such items that may be provided to the Concessioner by the Director, the Concessioner shall provide the plant, personnel, equipment, goods, and commodities necessary for providing, operating and maintaining the required and authorized visitor services in accordance with this CONTRACT. The Concessioner's authority to provide visitor services under the terms of this CONTRACT is non-exclusive.

(2) The following Support Services are required:

- Employee Cafeteria at Bright Angel Lodge
- Employee Housing
- Long term trailer village for NPS, Concession and cooperator employees only 86 sites
- Long term trailer village for NPS, Concession and cooperator employees only at Pinyon Park – 39 sites
- Employee Shuttle
- Operation of Community Recreation Center

(c) Operating Plan

The Director, acting through the Superintendent, shall establish and revise, as necessary, specific requirements for the operations of the Concessioner under this CONTRACT in the form of an Operating Plan (including, without limitation, a risk management program, that must be adhered to by the

Concessioner). The initial Operating Plan is attached to this CONTRACT as Exhibit B. The Director in his discretion, after consultation with the Concessioner, may make reasonable modifications to the initial Operating Plan that are in furtherance of the purposes of this CONTRACT and are not inconsistent with the terms and conditions of the main body of this CONTRACT.

(d) Merchandise and Services

(1) The Director reserves the right to determine and control the nature, type and quality of the visitor services described in this CONTRACT, including, but not limited to, the nature, type, and quality of merchandise, to be sold or provided by the Concessioner within the Area.

(2) All promotional material, regardless of media format (i.e. printed, electronic, broadcast media), provided to the public by the Concessioner in connection with the services provided under this CONTRACT must be approved in writing by the Director prior to use. All such material will identify the Concessioner as an authorized Concessioner of the National Park Service, Department of the Interior.

(3) The Concessioner, where applicable, will develop and implement a plan satisfactory to the Director that will ensure that gift merchandise, if any, to be sold or provided reflects the purpose and significance of the Area, including, but not limited to, merchandise that reflects the conservation of the Area's resources or the Area's geology, wildlife, plant life, archaeology, local Native American culture, local ethnic culture, and historic significance.

(e) Rates

All rates and charges to the public by the Concessioner for visitor services shall be reasonable and appropriate for the type and quality of facilities and/or services required and/or authorized under this CONTRACT. The Concessioner's rates and charges to the public must be approved by the Director in

accordance with Applicable Laws and guidelines promulgated by the Director from time to time.

(f) Impartiality as to Rates and Services

(1) Subject to Section (f)(2) and (f)(3), in providing visitor services, the Concessioner must require its employees to observe a strict impartiality as to rates and services in all circumstances. The Concessioner shall comply with all Applicable Laws relating to nondiscrimination in providing visitor services to the public including, without limitation, those set forth in Exhibit C.

(2) The Concessioner may grant complimentary or reduced rates under such circumstances as are customary in businesses of the character conducted under this CONTRACT. However, the Director reserves the right to review and modify the Concessioner's complimentary or reduced rate policies and practices as part of its rate approval process.

(3) The Concessioner will provide Federal employees conducting official business reduced rates for lodging, essential transportation and other specified services necessary for conducting official business in accordance with guidelines established by the Director. Complimentary or reduced rates and charges shall otherwise not be provided to Federal employees by the Concessioner except to the extent that they are equally available to the general public.

SEC. 4. CONCESSIONER PERSONNEL

(a) Employees

(1) The Concessioner shall provide all personnel necessary to provide the visitor services required and authorized by this CONTRACT.

(2) The Concessioner shall comply with all Applicable Laws relating to employment and employment conditions, including, without limitation, those set forth in Exhibit C.

(3) The Concessioner shall ensure that its employees are hospitable and exercise courtesy and consideration in their relations with the public. The Concessioner shall have its employees who come in direct contact with the public, so far as practicable, wear a uniform or badge by which they may be identified as the employees of the Concessioner.

(4) The Concessioner shall establish pre-employment screening, hiring, training, employment, termination and other policies and procedures for the purpose of providing visitor services through its employees in an efficient and effective manner and for the purpose of maintaining a healthful, law abiding, and safe working environment for its employees. The Concessioner shall conduct appropriate background reviews of applicants to whom an offer for employment may be extended to assure that they conform to the hiring policies established by the Concessioner.

(5) The Concessioner shall ensure that its employees are provided the training needed to provide quality visitor services and to maintain up-to-date job skills.

(6) The Concessioner shall review the conduct of any of its employees whose action or activities are considered by the Concessioner or the Director to be inconsistent with the proper administration of the Area and enjoyment and protection of visitors and shall take such actions as are necessary to correct the situation.

(7) The Concessioner shall maintain, to the greatest extent possible, a drug free environment, both in the workplace and in any Concessioner employee housing within the Area.

(8) The Concessioner shall publis'. a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and in the Area, and specifying the actions that will be taken against employees for violating this prohibition. In addition, the Concessioner shall establish a drug-

free awareness program to inform employees about the danger of drug abuse in the workplace and the Area; the availability of drug counseling, rehabilitation and employee assistance programs; and the Concessioner's policy of maintaining a drug-free environment both in the workplace and in the Area.

(9) The Concessioner shall take appropriate personnel action, up to and including termination or requiring satisfactory participation in a drug abuse or rehabilitation program which is approved by a Federal, State, or local health, law enforcement or other appropriate agency, for any employee that is found to be in violation of the prohibition on the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(b) Employee Housing and Recreation

(1) If the Concessioner is required to provide employee housing under this CONTRACT, the Concessioner's charges to its employees for this housing must be reasonable.

(2) If the visitor services required and/or authorized under this CONTRACT are located in a remote or isolated area, the Concessioner shall provide appropriate employee recreational activities.

SEC. 5. LEGAL, REGULATORY, AND POLICY COMPLIANCE

(a) Legal, Regulatory and Policy Compliance

This CONTRACT, operations thereunder by the Concessioner and the administration of it by the Director, shall be subject to all Applicable Laws. The Concessioner must comply with all Applicable Laws in fulfilling its obligations under this CONTRACT at the Concessioner's sole cost and expense. Certain Applicable Laws governing protection of the environment are further described in this CONTRACT. Certain Applicable Laws relating to nondiscrimination in

employment and providing accessible facilities and services to the public are further described in this CONTRACT.

(b) Notice

The Concessioner shall give the Director immediate written notice of any violation of Applicable Laws by the Concessioner, including its employees, agents or contractors, and, at its sole cost and expense, must promptly rectify any such violation.

(c) How and Where to Send Notice

All notices required by this CONTRACT shall be in writing and shall be served on the parties at the following addresses. The mailing of a notice by registered or certified mail, return receipt requested, shall be sufficient service. Notices sent to the Director shall be sent to the following address:

Superintendent
Grand Canyon National Park
P.O. Box 129
Grand Canyon, AZ 86023
Attention: Chief, Concessions Management

Notices sent to the Concessioner shall be sent to the following address:

Concessioner
Address
Attention:

SEC. 6. ENVIRONMENTAL AND CULTURAL PROTECTION

(a) Environmental Management Objectives

The Concessioner shall meet the following environmental management objectives (hereinafter "Environmental Management Objectives") in the conduct of its operations under this CONTRACT:

(1) The Concessioner, including its employees, agents and contractors, shall comply with all Applicable Laws pertaining to the protection of human health and the environment.

(2) The Concessioner shall incorporate Best Management Practices (BMPs) in its operation, construction, maintenance, acquisition, provision of visitor services, and other activities under this CONTRACT.

(b) Environmental Management Program

(1) The Concessioner shall develop, document, implement, and comply fully with, to the satisfaction of the Director, a comprehensive written Environmental Management Program (EMP) to achieve the Environmental Management Objectives. The initial EMP shall be developed and submitted to the Director for approval within sixty days of the effective date of this CONTRACT. The Concessioner shall submit to the Director for approval a proposed updated EMP annually.

(2) The EMP shall account for all activities with potential environmental impacts conducted by the Concessioner or to which the Concessioner contributes. The scope and complexity of the EMP may vary based on the type, size and number of Concessioner activities under this CONTRACT.

(3) The EMP shall include, without limitation, the following elements:

(i) Policy. The EMP shall provide a clear statement of the Concessioner's commitment to the Environmental Management Objectives.

(ii) Goals and Targets. The EMP shall identify environmental goals established by the Concessioner consistent with all Environmental Management Objectives. The EMP shall also identify specific targets (i.e. measurable results and schedules) to achieve these goals.

(iii) Responsibilities and Accountability. The EMP shall identify environmental responsibilities for Concessioner em-

ployees and contractors. The EMP shall include the designation of an environmental program manager. The EMP shall include procedures for the Concessioner to implement the evaluation of employee and contractor performance against these environmental responsibilities.

(iv) Documentation. The EMP shall identify plans, procedures, manuals, and other documentation maintained by the Concessioner to meet the Environmental Management Objectives.

(v) Documentation Control and Information Management System. The EMP shall describe (and implement) document control and information management systems to maintain knowledge of Applicable Laws and BMPs. In addition, the EMP shall identify how the Concessioner will manage environmental information, including without limitation, plans, permits, certifications, reports, and correspondence.

(vi) Reporting. The EMP shall describe (and implement) a system for reporting environmental information on a routine and emergency basis, including providing reports to the Director under this CONTRACT.

(vii) Communication. The EMP shall describe how the environmental policy, goals, targets, responsibilities and procedures will be communicated throughout the Concessioner's organization.

(viii) Training. The EMP shall describe the environmental training program for the Concessioner, including identification of staff to be trained, training subjects, frequency of training and how training will be documented.

(ix) Monitoring, Measurement, and Corrective Action. The EMP shall describe how the Concessioner will comply with the EMP and how the Concessioner will self-assess its performance under the EMP, a least annually, in a manner consistent with NPS protocol regarding audit of NPS operations. The selfassessment should ensure the Concessioner's con-

formance with the Environmental Management Objectives and measure performance against environmental goals and targets. The EMP shall also describe procedures to be taken by the Concessioner to correct any deficiencies identified by the self-assessment.

(c) Environmental Performance Measurement

The Concessioner shall be evaluated by the Director on its environmental performance under this CONTRACT, including, without limitation, compliance with the approved EMP, on at least an annual basis.

(d) Environmental Data, Reports, Notifications, and Approvals

(1) Inventory of Hazardous Substances and Inventory of Waste Streams. The Concessioner shall submit to the Director, at least annually, an inventory of Federal Occupational Safety and Health Administration (OSHA) designated hazardous chemicals used and stored in the Area by the Concessioner. The Director may prohibit the use of any OSHA hazardous chemical by the Concessioner in operations under this CONTRACT. The Concessioner shall obtain the Director's approval prior to using any extremely hazardous substance, as defined in the Emergency Planning and Community Right to Know Act of 1986, in operations under this CONTRACT. The Concessioner shall also submit to the Director, at least annually, an inventory of all waste streams generated by the Concessioner under this CONTRACT. Such inventory shall include any documents, reports, monitoring data, manifests, and other documentation required by Applicable Laws regarding waste streams.

(2) Reports. The Concessioner shall submit to the Director copies of all documents, reports, monitoring data, manifests, and other documentation required under Applicable Laws to be submitted to regulatory agencies. The Concessioner shall also submit to the Director any environmental plans for

which coordination with Area operations are necessary and appropriate, as determined by the Director in accordance with Applicable Laws.

(3) Notification of Releases. The Concessioner shall give the Director immediate written notice of any discharge, release or threatened release (as these terms are defined by Applicable Laws) within or at the vicinity of the Area, (whether solid, semi-solid, liquid or gaseous in nature) of any hazardous or toxic substance, material, or waste of any kind, including, without limitation, building materials such as asbestos, or any contaminant, pollutant, petroleum, petroleum product or petroleum by-product.

(4) Notice of Violation. The Concessioner shall give the Director in writing immediate notice of any written threatened or actual notice of violation from other regulatory agencies of any Applicable Law arising out of the activities of the Concessioner, its agents or employees.

(5) Communication with Regulatory Agencies. The Concessioner shall provide timely written advance notice to the Director of communications, including without limitation, meetings, audits, inspections, hearings and other proceedings, between regulatory agencies and the Concessioner related to compliance with Applicable Laws concerning operations under this CONTRACT. The Concessioner shall also provide to the Director any written materials prepared or received by the Concessioner in advance of or subsequent to any such communications. The Concessioner shall allow the Director to participate in any such communications. The Concessioner shall also provide timely notice to the Director following any unplanned communications between regulatory agencies and the Concessioner.

(e) Corrective Action

(1) The Concessioner, at its sole cost and expense, shall promptly control and contain any discharge, release or

threatened release, as set forth in this Section, or any threatened or actual violation, as set forth in this Section, arising in connection with the Concessioner's operations under this CONTRACT, including, but not limited to, payment of any fines or penalties imposed by appropriate agencies. Following the prompt control or containment of any release, discharge or violation, the Concessioner shall take all response actions necessary to remediate the release, discharge or violation, and to protect human health and the environment.

(2) Even if not specifically required by Applicable Laws, the Concessioner shall comply with directives of the Director to clean up or remove any materials, product or by-product used, handled, stored, disposed, or transported onto or into the Area by the Concessioner to ensure that the Area remains in good condition.

(f) Indemnification and Cost Recovery for Concessioner Environmental Activities

(1) The Concessioner shall indemnify the United States in accordance with Section 12 of this CONTRACT from all losses, claims, damages, environmental injuries, expenses, response costs, allegations or judgments (including, without limitation, fines and penalties) and expenses (including, without limitation, attorneys fees and experts' fees) arising out of the activities of the Concessioner, its employees, agents and contractors pursuant to this Section. Such indemnification shall survive termination or expiration of this CONTRACT.

(2) If the Concessioner does not promptly contain and remediate an unauthorized discharge or release arising out of the activities of the Concessioner, its employees, agents and contractors, as set forth in this Section, or correct any environmental self-assessment finding of non-compliance, in full compliance with Applicable Laws, the Director may, in its sole discretion and after notice to the Concessioner, take any such action consistent with Applicable Laws as the Director

deems necessary to abate, mitigate, remediate, or otherwise respond to such release or discharge, or take corrective action on the environmental self-assessment finding. The Concessioner shall be liable for and shall pay to the Director any costs of the Director associated with such action upon demand. Nothing in this Section shall preclude the Concessioner from seeking to recover costs from a responsible third party.

(g) Weed and Pest Management

The Concessioner shall be responsible for managing weeds, and through an integrated pest management program, harmful insects, rats, mice and other pests on Concession Facilities assigned to the Concessioner under this CONTRACT. All such weed and pest management activities shall be in accordance with Applicable Laws and guidelines established by the Director.

(h) Protection of Cultural and Archaeological Resources.

The Concessioner shall ensure that any protected sites and archaeological resources within the Area are not disturbed or damaged by the Concessioner, including the Concessioner's employees, agents and contractors, except in accordance with Applicable Laws, and only with the prior approval of the Director. Discoveries of any archaeological resources by the Concessioner shall be promptly reported to the Director. The Concessioner shall cease work or other disturbance which may impact any protected site or archaeological resource until the Director grants approval, upon such terms and conditions as the Director deems necessary, to continue such work or other disturbance.

SEC. 7. INTERPRETATION OF AREA RESOURCES

(a) Concessioner Obligations

(1) The Concessioner shall provide all visitor services in a manner that is consistent with and supportive of the interpre-

tive themes, goals and objectives of the Area as reflected in Area planning documents, mission statements and/or interpretive prospectuses.

(2) The Concessioner may assist in Area interpretation at the request of the Director to enhance visitor enjoyment of the Area. Any additional visitor services that may result from this assistance must be recognized in writing through written amendment of Section 3 of this CONTRACT.

(3) The Concessioner is encouraged to develop interpretive materials or means to educate visitors about environmental programs or initiatives implemented by the Concessioner.

(b) Director Review of Content

The Concessioner must submit the proposed content of any interpretive programs, exhibits, displays or materials, regardless of media format (i.e. printed, electronic, or broadcast media), to the Director for review and approval prior to offering such programs, exhibits, displays or materials to Area visitors.

SEC. 8. CONCESSION FACILITIES USED IN OPERATION BY THE CONCESSIONER

(a) Assignment of Concession Facilities

(1) The Director hereby assigns the following Concession Facilities to the Concessioner for the purposes of this CONTRACT:

(i) certain parcels of Area land as described in Exhibit D upon which, among other matters, the Concessioner may be authorized to construct Real Property; and

(ii) certain Real Property improvements described in Exhibit D in existence as of the effective date of this CONTRACT, as may be modified from time to time to include additional Real Property improvements

completed in accordance with the terms and conditions of this CONTRACT.

(2) The Director shall from time to time amend Exhibit D to reflect changes in Concession Facilities assigned to the Concessioner, including, without limitation, amend Exhibit D to reflect the addition of Real Property improvements completed in accordance with the terms and conditions of this CONTRACT and to reflect the withdrawal of concession facilities as set forth below.

(b) Concession Facilities Withdrawals

The Director may withdraw all or portions of these Concession Facilities assignments at any time during the term of this CONTRACT if:

(1) the withdrawal is necessary for the purpose of conserving, preserving or protecting Area resources or visitor enjoyment or safety;

(2) the operations utilizing the assigned Concession Facilities have been terminated or suspended by the Director; or

(3) land or Real Property improvements assigned to the Concessioner are no longer necessary for the concession operation.

(c) Effect of Withdrawal

Any permanent withdrawal of assigned Concession Facilities which the Director or the Concessioner considers to be essential for the Concessioner to provide the visitor services required by this CONTRACT will be treated as a termination of this CONTRACT pursuant to Section 16. The Concessioner will be compensated pursuant to Section 17 for the value of any Leasehold Surrender Interest it may have, if any, in permanently withdrawn Concession Facilities. No other compensation is due the Concessioner in these circumstances.

(d) Right of Entry

The Director shall have the right at any time to enter upon or into the Concession Facilities assigned to the Concessioner under this CONTRACT for any purpose he may deem necessary for the administration of the Area.

(e) Personal Property

(1) Personal Property Provided by the Concessioner. The Concessioner shall provide all personal property, including without limitation removable equipment, furniture and goods, necessary for its operations under this CONTRACT, unless such personal property is provided by the Director as set forth in subsection (e)(3).

2) Historic Personal Property Provided by the Concessioner. The Concessioner will provide certain existing property of historic or other significance, as described in Exhibit J. This Historic Personal Property is intrinsic to the historic and cultural values of the Area, and may include artistic, historic or cultural artifacts. The Concessioner shall be responsible for maintaining this Historic Personal Property as necessary to keep it in service, available to the public, and in good and operable condition. At the expiration or other termination of this contract, such Historic Personal Property shall be transferred to the successor concessioner, as designated by the Director, upon payment of its book value. In the event any of the items listed in Exhibit J are determined to be part of the realty, they will be transferred to a successor concessioner as part of the realty in accordance with Exhibit A to this CONTRACT.

(3) Personal Property Provided by the Government. The Director may provide certain items of government personal property, including without limitation removable equipment, furniture and goods, for the Concessioner's use in the performance of this CONTRACT. The Director hereby assigns government personal property listed in Exhibit E to the Concessioner as of the effective date of this CONTRACT. This Exhibit E will be modified from time to time by the Director as items may be withdrawn or additional items added. The Concessioner shall be accountable to the Director for the government personal property assigned to it and shall be responsible for maintaining the property as necessary to keep it in good and operable condition. If the property ceases to be serviceable, it shall be transferred to the Director for disposition.

(f) Condition of Concession Facilities

The Concessioner has inspected the Concession Facilities and any assigned government personal property, is thoroughly acquainted with their condition, and accepts the Concession Facilities, and any assigned government personal property, "as is."

(g) Utilities Provided by the Director.

The Director may provide utilities to the Concessioner for use in connection with the operations required or authorized hereunder when available and at rates to be determined in accordance with Applicable Laws.

(h) Utilities not Provided by the Director

If the Director does not provide utilities to the Concessioner, the Concessioner shall, with the written approval of the Director and under any requirements that the Director shall prescribe, secure necessary utilities at its own expense from sources outside the Area or shall install the utilities within the Area with the written permission of the Director, subject to the following conditions:

(1) Any water rights deemed necessary by the Concessioner for use of water on Area or other Federal lands must be acquired at the Concessioner's expense in accordance with applicable State procedures and law. Upon expiration or termination of this CONTRACT for any reason, the Conces-

sioner must assign these water rights to the United States without compensation, and these water rights will become the property of the United States;

(2) If requested by the Director, the Concessioner must provide to the Director any utility service provided by the Concessioner under this Section to such extent as will not unreasonably restrict anticipated use by the Concessioner. Unless otherwise agreed by the Concessioner and the Director in writing, the rate per unit charged the Director for such service shall be approximately the average cost per unit of providing such service; and

(3) All appliances and machinery to be used in connection with the privileges granted in this subsection, as well as the plans for location and installation of such appliances and machinery, shall first be approved by the Director.

SEC. 9. CONSTRUCTION OR INSTALLATION OF REAL PROPERTY IMPROVEMENTS

(a) Construction of Real Property Improvements

The Concessioner may construct or install upon lands assigned to the Concessioner under this CONTRACT only those Real Property improvements that are determined by the Director to be necessary and appropriate for the conduct by the Concessioner of the visitor services required and/or authorized under this CONTRACT. Construction or installation of Real Property improvements may occur only after the written approval by the Director of their location, plans, and specifications. The form and content of the application and the procedures for such approvals, as may be modified by the Director from time to time, are set forth in Exhibit F. All Real Property improvements constructed or installed by the Concessioner will immediately become the property of the United States and be considered Concession Facilities.

(b) Removal of Real Property Improvements

(1) The Concessioner may not remove, dismantle, or demolish Real Property improvements in the Area without the prior approval of the Director.

(2) Any salvage resulting from the authorized removal, severance or demolition of a Real Property improvement within the Area shall be the property of the United States.

(3) In the event that an assigned Real Property improvement is removed, abandoned, demolished, or substantially destroyed and no other improvement is constructed on the site, the Concessioner, at its expense, shall promptly, upon the request of the Director, restore the site as nearly as practicable to its original condition.

(c) Leasehold Surrender Interest

(1) This CONTRACT hereby provides the Concessioner, subject to all applicable definitions, requirements and limitations of this CONTRACT and Exhibit A, a Leasehold Surrender Interest in Capital Improvements constructed by the Concessioner under the terms of this CONTRACT, including, but not limited to, those Capital Improvements constructed as part of the Concession Facilities Improvement Program and those Capital Improvements which result from the Major Rehabilitation of an existing Real Property improvement. Upon completion of a Major Rehabilitation by the Concessioner, an existing Real Property improvement assigned to the Concessioner in which the Concessioner had no Leasehold Surrender Interest prior to the Major Rehabilitation shall be considered as a Capital Improvement for all purposes of this CONTRACT.

(2) This CONTRACT may provide the Concessioner a Leasehold Surrender Interest in Real Property improvements resulting from possessory interest obtained under the terms of a possessory interest concession contract. Exhibit G describes the Real Property improvements, if any, in which the

Concessioner has such a Leasehold Surrender Interest and states the value of this Leasehold Surrender Interest as of the effective date of this CONTRACT.

(3) The Concessioner shall not obtain Leasehold Surrender Interest under this CONTRACT except as may be provided in Exhibit A and Exhibit F. Among other matters, no Leasehold Surrender Interest shall be obtained as a result of expenditures from the Repair and Maintenance Reserve described in this CONTRACT, and this CONTRACT does not provide a Leasehold Surrender Interest as a result of expenditures for repair and maintenance of Concession Facilities of any nature.

(d) Concession Facilities Improvement Program

(1) The Concessioner shall undertake and complete an improvement program (hereinafter "Concession Facilities Improvement Program") costing not more than $8.5 million , as adjusted for each project to reflect par value in the year of actual construction in accordance with the appropriate indexes of the Department of Labor's CPI-U Index, as published by the Department of Labor.

(2) The Concession Facilities Improvement Program shall include, subject to final decisions to be made after environmental and/or historic compliance:

LOCATION	PROJECT	ESTIMATED COST OF PROJECT	APPROX START DATE
Desert View Employee Housing	12 x 2-bedroom apartments	$1,962,300	Jan-02
Desert View Employee Housing	20 x 1 bedroom apartments	$952,840	Jan-03
South Rim Historic District	Relocate concessioner maintenance facility	$175,000	Jan-02
Desert View Service Station	Renovate structure, enlarge restrooms, convert pumps to 24-hour	$188,000	Jan-02
Desert View Watchtower	Renovation	$817,250	Jan-03
Desert View	Design and construct new Desert View Trading Post	$703,710	Jan-03
Desert View	Demolish existing Desert View Trading Post	$26,808	Jan-03
South Rim Village Historic Area	Remodel auto shop at rear of General Offices	$1,787,880	Jul-04
Bright Angel Lodge	Renovation of Restaurant, Lobby & exterior	$911,050	Jul-05
Bright Angel Lodge	Renovate Buckey O'Neill Suite and Red Horse Cabin	$72,000	Jul-05
South Rim Village Historic Area	Demolish Shirley Hall	$48,000	Jul-05
Hermits Rest	Renovation, including replacement of storage building and septic system	$451,575	Jan-07
NPS Building One	Renovation	$376,640	Jan-07
Total Anticipated Cost		**$8,473,053**	

(3) The Concessioner shall commence construction under the Concession Facilities Improvement Program on or before January 1, 2002 in a manner that demonstrates to the satisfaction of the Director that the Concessioner is in good faith carrying the Concession Facilities Improvement Program forward reasonably under the circumstances. No construction may begin until the Concessioner receives written approval from the Director of plans and specifications in accordance with Exhibit F. During the period of construction, the Concessioner shall provide the Director with such evidence or documentation, as may be satisfactory to the Director, to demonstrate that the Concession Facilities Improvement Program duly is being carried forward. In the event the Concessioner is unable to construct all of the above projects within the $8.5 million budget or certain projects do not gain final approval from the Director, the project list and/or specific projects will be modified or amended as necessary to reflect such changes and the full expenditure of the $8.5 million budget. The amendments will reflect the list above, which is in priority order.

(4) The Concessioner shall complete and have the Real Property improvements available for public use on or before January 1, 2005. The Director may extend this date in circumstances where the Director determines that the delay resulted from events beyond the control of the Concessioner.

SEC. 10. MAINTENANCE

(a) Maintenance Obligation

The Concessioner shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director.

(b) Maintenance Plan

For these purposes, the Director, acting through the Superintendent, shall undertake appropriate inspections, and shall establish and revise, as necessary, a Maintenance Plan consisting of specific maintenance requirements which shall be adhered to by the Concessioner. The initial Maintenance Plan is set forth in Exhibit H. The Director in his discretion may make reasonable modifications to the Maintenance Plan from time to time after consultation with the Concessioner. Such modifications shall be in furtherance of the purposes of this CONTRACT and shall not be inconsistent with the terms and conditions of the main body of this CONTRACT.

(c) Repair and Maintenance Reserve

(1) The Concessioner shall establish and manage a Repair and Maintenance Reserve. The funds in this Reserve shall be used to carry out, on a project basis in accordance with Exhibits F and H, repair and maintenance of Concession Facilities that are non-recurring within a seven-year time frame. Such projects may include repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects. Projects will be carried out by the Concessioner as the Director shall direct in writing in advance of any expenditure being made and in accordance with project proposals approved by the Director. No projects may be commenced until the Concessioner receives written approval from the Director.

(2) Projects paid for with funds from the Repair and Maintenance Reserve will not include routine, operational maintenance of facilities or housekeeping and groundskeeping activities. Nothing in this section shall lessen the responsibility of the Concessioner to carry out the maintenance and repair of Concession Facilities or housekeeping and groundskeeping responsibilities as required by this CONTRACT from Concessioner funds exclusive of the funds contained in the Repair and Maintenance Reserve.

(3) The Concessioner shall establish within its accounting system a Repair and Maintenance Reserve. The Concessioner shall debit to this Reserve, within fifteen (15) days after the last day of each month that the Concessioner operates a sum equal to: one percent (1%) of the Concessioner's gross receipts for the previous month. If the Concessioner fails to make timely debits to the Repair and Maintenance Reserve, the Director may terminate this CONTRACT for default or may require the Concessioner to post a bond in an amount equal to the estimated annual Repair and Maintenance Reserve allocation, based on the preceding year's gross receipts.

(4) The balance in the Repair and Maintenance Reserve shall be available for projects in accordance with the Reserve's purpose. For all expenditures made for each project from the Repair and Maintenance Reserve, the Concessioner shall maintain auditable records including invoices, billings, canceled checks, and other documentation satisfactory to the Director. Failure to expend Repair and Maintenance Reserve Funds when directed by the Director shall be considered as a material breach of this CONTRACT for which the Director may seek monetary damages and other legal relief, including, without limitation, termination of this CONTRACT.

(5) Repair and Maintenance Reserve funds shall not be used for a major rehabilitation as defined in this CONTRACT. The Concessioner shall obtain no ownership, Leasehold Surrender Interest, or other compensable interest as a conse-

quence of the expenditure of Repair and Maintenance Reserve funds.

(6) Any Repair and Maintenance Reserve funds not duly expended by the Concessioner as of the termination or expiration of this CONTRACT shall be retained by the Concessioner (subject to otherwise applicable terms and conditions of this CONTRACT).

SEC. 11. FEES

(a) Franchise Fee

(1) For the term of this CONTRACT, the Concessioner shall pay to the Director for the privileges granted under this CONTRACT a franchise fee equal to _____ **percent** (__%) of the Concessioner's gross receipts for the preceding year or portion of a year.

(2) Neither the Concessioner nor the Director shall have a right to an adjustment of the fees except as provided below. The Concessioner has no right to waiver of the fee under any circumstances.

(b) Payments Due

(1) The franchise fee shall be due on a monthly basis at the end of each month and shall be paid by the Concessioner in such a manner that the Director shall receive payment within fifteen (15) days after the last day of each month that the Concessioner operates. This monthly payment shall include the franchise fee equal to the specified percentage of gross receipts for the preceding month.

(2) The Concessioner shall pay any additional fee amounts due at the end of the operating year as a result of adjustments at the time of submission of the Concessioner's Annual Financial Report. Overpayments shall be offset against the following year's fees. In the event of termination or expiration of this CONTRACT, overpayments will first be offset

against any amounts due and owing the Government, and the remainder will be paid to the Concessioner.

(3) All franchise fee payments shall be deposited electronically by the Concessioner using approved National Park Service administrative procedures, as described in the Operating Plan.

(c) Interest

An interest charge will be assessed on overdue amounts for each thirty (30) day period, or portion thereof, that payment is delayed beyond the fifteen (15) day period provided for above. The percent of interest charged will be based on the current value of funds to the United States Treasury as published annually in the Treasury Fiscal Requirements Manual. The Director may also impose penalties for late payment to the extent authorized by Applicable Law.

(d) Adjustment of Franchise Fee

(1) The Concessioner or the Director may request, in the event that either considers that extraordinary, unanticipated changes have occurred after the effective date of this CONTRACT, a reconsideration and possible subsequent adjustment of the franchise fee established in this Section. For the purposes of this Section, the phrase "extraordinary, unanticipated changes" shall mean extraordinary, unanticipated changes from the conditions existing or reasonably anticipated before the effective date of this CONTRACT which have or will significantly affect the probable value of the privileges granted to the Concessioner by this CONTRACT. For the purposes of this Section, the phrase "probable value" means a reasonable opportunity for net profit in relation to capital invested and the obligations of this CONTRACT.

(2) The Concessioner or the Director must make a request for a reconsideration by mailing, within sixty (60) days from the date that the party becomes aware, or should have become aware, of the possible extraordinary, unanticipated changes, a

written notice to the other party that includes a description of the possible extraordinary, unanticipated changes and why the party believes they have affected or will significantly affect the probable value of the privileges granted by this CONTRACT.

(3) If the Concessioner and the Director agree that extraordinary, unanticipated changes have occurred, the Concessioner and the Director will undertake good faith negotiations as to an appropriate adjustment of the franchise fee.

(4) The negotiation will last for a period of sixty (60) days from the date the Concessioner and the Director agree that extraordinary, unanticipated changes occurred. If the negotiation results in agreement as to an adjustment (up or down) of the franchise fee within this period, the franchise fee will be adjusted accordingly, prospectively as of the date of agreement.

(5) If the negotiation does not result in agreement as to the adjustment of the franchise fee within this sixty (60) day period, then either the Concessioner or the Director may request binding arbitration to determine the adjustment to franchise fee in accordance with this Section. Such a request for arbitration must be made by mailing written notice to the other party within fifteen (15) days of the expiration of the sixty (60) day period.

(6) Within thirty (30) days of receipt of such a written notice, the Concessioner and the Director shall each select an arbiter. These two arbiters, within thirty (30) days of selection, must agree to the selection of a third arbiter to complete the arbitration panel. Unless otherwise agreed by the parties, the arbitration panel shall establish the procedures of the arbitration. Such procedures must provide each party a fair and equal opportunity to present its position on the matter to the arbitration panel.

(7) The arbitration panel shall consider the written submissions and any oral presentations made by the Concessioner and the Director and provide its decision on an adjusted franchise fee (up, down or unchanged) that is consistent with the probable value of the privileges granted by this CONTRACT within sixty (60) days of the presentations.

(8) Any adjustment to the franchise fee resulting from this Section shall be prospective only.

(9) Any adjustment to the franchise fee will be embodied in an amendment to this CONTRACT.

(10) During the pendency of the process described in this Section, the Concessioner shall continue to make the established franchise fee payments required by this CONTRACT.

SEC. 12. INDEMNIFICATION AND INSURANCE

(a) Indemnification

The Concessioner agrees to assume liability for and does hereby agree to save, hold harmless, protect, defend and indemnify the United States of America, its agents and employees from and against any and all liabilities, obligations, losses, damages or judgments (including without limitation penalties and fines), claims, actions, suits, costs and expenses (including without limitation attorneys fees and experts' fees) of any kind and nature whatsoever on account of fire or other peril, bodily injury, death or property damage, or claims for bodily injury, death or property damage of any nature whatsoever, and by whomsoever made, in any way connected with or arising out of the activities of the Concessioner, its employees, agents or contractors under this CONTRACT. This indemnification shall survive the termination or expiration of this CONTRACT.

(b) Insurance in General

(1) The Concessioner shall obtain and maintain during the entire term of this CONTRACT at its sole cost and expense,

the types and amounts of insurance coverage necessary to fulfill the obligations of this CONTRACT as determined by the Director. The initial insurance requirements are set forth below and in Exhibit I. Any changed or additional requirements that the Director determines necessary must be reasonable and consistent with the types and coverage amounts of insurance a prudent businessperson would purchase in similar circumstances. The Director shall approve the types and amounts of insurance coverage purchased by the Concessioner.

(2) The Director will not be responsible for any omissions or inadequacies of insurance coverages and amounts in the event the insurance purchased by the Concessioner proves to be inadequate or otherwise insufficient for any reason whatsoever.

(3) At the request of the Director, the Concessioner shall at the time insurance is first purchased and annually thereafter, provide the Director with a Certificate of Insurance that accurately details the conditions of the policy as evidence of compliance with this Section. The Concessioner shall provide the Director immediate written notice of any material change in the Concessioner's insurance program hereunder, including without limitation, cancellation of any required insurance coverages.

(c) Commercial Public Liability

(1) The Concessioner shall provide commercial general liability insurance against claims arising out of or resulting from the acts or omissions of the Concessioner or its employees, agents or contractors, in carrying out the activities and operations required and/or authorized under this CONTRACT.

(2) This insurance shall be in the amount commensurate with the degree of risk and the scope and size of the activities required and/or authorized under this CONTRACT, as more

specifically set forth in Exhibit I. Furthermore, the commercial general liability package shall provide no less than the coverages and limits described in Exhibit I.

(3) All liability policies shall specify that the insurance company shall have no right of subrogation against the United States of America and shall provide that the United States of America is named an additional insured.

(4) From time to time, as conditions in the insurance industry warrant, the Director may modify Exhibit I to revise the minimum required limits or to require additional types of insurance, provided that any additional requirements must be reasonable and consistent with the types of insurance a prudent businessperson would purchase in similar circumstances.

(d) Property Insurance

(1) In the event of damage or destruction, the Concessioner will repair or replace those Concession Facilities and personal property utilized by the Concessioner in the performance of the Concessioner's obligations under this CONTRACT.

(2) For this purpose, the Concessioner shall provide fire and extended insurance coverage on Concession Facilities for all or part of their replacement cost as specified in Exhibit I in amounts no less than the Director may require during the term of the CONTRACT. The minimum values currently in effect are set forth in Exhibit I.

(3) Commercial property insurance shall provide for the Concessioner and the United States of America to be named insured as their interests may appear.

(4) In the event of loss, the Concessioner shall use all proceeds of such insurance to repair, rebuild, restore or replace Concession Facilities and/or personal property utilized in the Concessioner's operations under this CONTRACT, as di-

rected by the Director. Policies may not contain provisions limiting insurance proceeds to in situ replacement. The lien provision of Section 13 shall apply to such insurance proceeds. The Concessioner shall not be relieved of its obligations under subsection (d)(1) because insurance proceeds are not sufficient to repair or replace damaged or destroyed property.

(5) Insurance policies that cover Concession Facilities shall contain a loss payable clause approved by the Director which requires insurance proceeds to be paid directly to the Concessioner without requiring endorsement by the United States. The use of insurance proceeds for repair or replacement of Concession Facilities will not alter their character as properties of the United States and, notwithstanding any provision of this CONTRACT to the contrary, the Concessioner shall gain no ownership, Leasehold Surrender Interest or other compensable interest as a result of the use of these insurance proceeds.

(6) The commercial property package shall include the coverages and amounts described in Exhibit I.

SEC. 13. BONDS AND LIENS

(a) Bonds

The Director may require the Concessioner to furnish appropriate forms of bonds in amounts reasonable in the circumstances and acceptable to the Director, in order to ensure faithful performance of the Concessioner's obligations under this CONTRACT.

(b) Lien

As additional security for the faithful performance by the Concessioner of its obligations under this CONTRACT, and the payment to the Government of all damages or claims that may result from the Concessioner's failure to observe any such obligations, the Government shall have at all times the

first lien on all assets of the Concessioner within the Area, including, but not limited to, all personal property of the Concessioner used in performance of the CONTRACT hereunder within the Area and any Leasehold Surrender Interest of the Concessioner.

SEC. 14. ACCOUNTING RECORDS AND REPORTS

(a) Accounting System

(1) The Concessioner shall maintain an accounting system under which its accounts can be readily identified with its system of accounts classification. Such accounting system shall be capable of providing the information required by this CONTRACT, including but not limited to the Concessioner's repair and maintenance obligations. The Concessioner's system of accounts classification shall be directly related to the Concessioner Annual Financial Report Form issued by the Director.

(2) If the Concessioner's annual gross receipts are $250,000 or more, the Concessioner must use the accrual accounting method.

(3) In computing net profits for any purposes of this CONTRACT, the Concessioner shall keep its accounts in such manner that there can be no diversion or concealment of profits or expenses in the operations authorized under this CONTRACT by means of arrangements for the procurement of equipment, merchandise, supplies or services from sources controlled by or under common ownership with the Concessioner or by any other device.

(b) Annual Financial Report

(1) The Concessioner shall submit annually as soon as possible but not later than one hundred twenty (120) days after the last day of its fiscal year a financial statement for the preceding fiscal year or portion of a year as prescribed by the Director ("Concessioner Annual Financial Report").

(2) If the annual gross receipts of the Concessioner are in excess of $1,000,000, the financial statements shall be audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards (GAAS) and procedures promulgated by the American Institute of Certified Public Accountants.

(3) If annual gross receipts are between $250,000, and $1,000,000, the financial statements shall be reviewed by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards (GAAS) and procedures promulgated by the American Institute of Certified Public Accountants.

(4) If annual gross receipts are less than $250,000, the financial statements may be prepared without involvement by an independent Certified Public Accountant, unless otherwise directed by the Director.

(c) Other Financial Reports

(1) Balance Sheet. Within ninety (90) days of the execution of this CONTRACT or its effective date, whichever is later, the Concessioner shall submit to the Director a balance sheet as of the beginning date of the term of this CONTRACT. The balance sheet shall be audited or reviewed, as determined by the annual gross receipts, by an independent Certified Public Accountant. The balance sheet shall be accompanied by a schedule that identifies and provides details for all capital improvements in which the Concessioner claims a Leasehold Surrender Interest. The schedule must describe these capital improvements in detail showing for each such capital improvement the date acquired, constructed or installed.

(2) Statements of Reserve Activity. The Concessioner shall submit annually, not later than one hundred twenty (120) days after the end of the Concessioner's accounting year, a statement reflecting total activity in the Maintenance Reserve

for the preceding accounting year. The statement must reflect monthly inflows and outflows on a project by project basis.

SEC. 15. OTHER REPORTING REQUIREMENTS

The following describes certain other reports required under this CONTRACT:

(a) Insurance Certification

As specified in Section 12, the Concessioner shall, at the request of the Director, provide the Director with a Certificate of Insurance for all insurance coverages related to its operations under this CONTRACT. The Concessioner shall give the Director immediate written notice of any material change in its insurance program, including without limitation, any cancellation of required insurance coverages.

(b) Environmental Reporting

The Concessioner shall submit environmental reports as specified in Section 6 of this CONTRACT, and as otherwise required by the Director under the terms of this CONTRACT.

(c) Miscellaneous Reports and Data

The Director from time to time may require the Concessioner to submit other reports and data regarding its performance under the CONTRACT or otherwise, including, but not limited to, operational information.

SEC. 16. SUSPENSION, TERMINATION, OR EXPIRATION

(a) Suspension

The Director may temporarily suspend operations under this CONTRACT in whole or in part in order to protect Area visitors or to protect, conserve and preserve Area resources. No compensation of any nature shall be due the Concessioner by the Director in the event of a suspension of operations, including, but not limited to, compensation for losses based on

lost income, profit, or the necessity to make expenditures as a result of the suspension.

(b) Termination

(1) The Director may terminate this CONTRACT at any time in order to protect Area visitors, protect, conserve, and preserve Area resources, or to limit visitor services in the Area to those that continue to be necessary and appropriate.

(2) The Director may terminate this CONTRACT if the Director determines that the Concessioner has materially breached any requirement of this CONTRACT, including, but not limited to, the requirement to maintain and operate visitor services to the satisfaction of the Director, the requirement to provide only those visitor services required or authorized by the Director pursuant to this CONTRACT, the requirement to pay the established franchise fee, the requirement to prepare and comply with an Environmental Management Program, the requirement to duly expend funds from the repair and maintenance reserve and the requirement to comply with Applicable Laws.

(3) In the event of a breach of the CONTRACT, the Director will provide the Concessioner an opportunity to cure by providing written notice to the Concessioner of the breach. In the event of a monetary breach, the Director will give the Concessioner a fifteen (15) day period to cure the breach. If the breach is not cured within that period, then the Director may terminate the CONTRACT for default. In the event of a nonmonetary breach, if the Director considers that the nature of the breach so permits, the Director will give the Concessioner thirty (30) days to cure the breach, or to provide a plan, to the satisfaction of the Director, to cure the breach over a specified period of time. If the breach is not cured within this specified period of time, the Director may terminate the CONTRACT for default. Notwithstanding this provision, repeated breaches (two or more) of the same nature shall be grounds for termination for default without a cure

period. In the event of a breach of any nature, the Director may suspend the Concessioner's operations as appropriate in accordance with Section 16(a).

(4) The Director may terminate this CONTRACT upon the filing or the execution of a petition in bankruptcy by or against the Concessioner, a petition seeking relief of the same or different kind under any provision of the Bankruptcy Act or its successor, an assignment by the Concessioner for the benefit of creditors, a petition or other proceeding against the Concessioner for the appointment of a trustee, receiver, or liquidator, or, the taking by any person or entity of the rights granted by this CONTRACT or any part thereof upon execution, attachment or other process of law or equity. The Director may terminate this CONTRACT if the Director determines that the Concessioner is unable to perform the terms of CONTRACT due to bankruptcy or insolvency.

(5) Termination of this CONTRACT for any reason shall be by written notice to the Concessioner.

(c) Notice of Bankruptcy or Insolvency

The Concessioner must give the Director immediate notice (within five (5) days) after the filing of any petition in bankruptcy, filing any petition seeking relief of the same or different kind under any provision of the Bankruptcy Act or its successor, or making any assignment for the benefit of creditors. The Concessioner must also give the Director immediate notice of any petition or other proceeding against the Concessioner for the appointment of a trustee, receiver, or liquidator, or, the taking by any person or entity of the rights granted by this CONTRACT or any part thereof upon execution, attachment or other process of law or equity. For purposes of the bankruptcy statutes, NPS considers that this CONTRACT is not a lease but an executory contract exempt from inclusion in assets of Concessioner pursuant to 11 U.S.C. 365.

(d) Requirements in the Event of Termination or Expiration

(1) In the event of termination of this CONTRACT for any reason or expiration of this CONTRACT, the total compensation due the Concessioner for such termination or expiration shall be as described in Section 17 of this CONTRACT. No other compensation of any nature shall be due the Concessioner in the event of a termination or expiration of this CONTRACT, including, but not limited to, compensation for losses based on lost income, profit, or the necessity to make expenditures as a result of the termination.

(2) Upon termination of this CONTRACT for any reason, or upon its expiration, and except as otherwise provided in this Section, the Concessioner shall, at the Concessioner's expense, promptly vacate the Area, remove all of the Concessioner's personal property, repair any injury occasioned by installation or removal of such property, and ensure that Concession Facilities are in at least as good condition as they were at the beginning of the term of this CONTRACT, reasonable wear and tear excepted. The removal of such personal property must occur within thirty (30) days after the termination of this CONTRACT for any reason or its expiration (unless the Director in particular circumstances requires immediate removal).

(3) To avoid interruption of services to the public upon termination of this CONTRACT for any reason, or upon its expiration, the Concessioner, upon the request of the Director, shall consent to the use by another operator of the Concessioner's personal property, excluding inventories if any, not including current or intangible assets, for a period of time not to exceed one (1) year from the date of such termination or expiration. The other operator shall pay the Concessioner an annual fee for use of such property, prorated for the period of use, in the amount of the annual depreciation of such property, plus a return on the book value of such property equal to

the prime lending rate, as published by the Federal Reserve System Board of Governors, effective on the date the operator assumes managerial and operational responsibilities. In such circumstances, the method of depreciation applied shall be either straight line depreciation or depreciation as shown on the Concessioner's Federal income tax return, whichever is less. To avoid interruption of services to the public upon termination of this CONTRACT for any reason or its expiration, the Concessioner shall, if requested by the Director, sell its existing inventory to another operator at the purchase price as shown on applicable invoices.

SEC. 17. COMPENSATION

(a) Just Compensation

The compensation provided by this Section shall constitute full and just compensation to the Concessioner for all losses and claims occasioned by the circumstances described below.

(b) Compensation for CONTRACT Expiration or Termination

If, for any reason, including CONTRACT expiration or termination, the Concessioner shall cease to be authorized by the Director to conduct operations under this CONTRACT, the Concessioner shall convey to a person designated by the Director (including the Director if appropriate) any Leasehold Surrender Interest it has under the terms of this CONTRACT and the Director shall, subject to the terms and conditions of this CONTRACT, assure that the Concessioner is paid the Leasehold Surrender Interest Value.

(c) Procedures for Establishing the Value of a Leasehold Surrender Interest

At any time during the term of this CONTRACT, the Concessioner shall, when requested by the Director, enter into negotiations with the Director as to the value of the Concessioner's Leasehold Surrender Interest under this CON-

TRACT. In the event that such negotiations fail to determine an agreed upon value within a reasonable period of time as determined by the Director, the Director or the Concessioner may initiate arbitration proceedings to determine such value upon written request to the other party. Such arbitration proceedings shall be conducted in accordance with the arbitration procedures set forth in Exhibit A. In these circumstances, the Concessioner and the Director shall each select an arbiter. The two arbiters, within thirty (30) days of selection, must agree to the selection of a third arbiter to complete the arbitration panel in accordance with Exhibit A. The arbitration panel shall consider the written submissions and any oral presentations made by the Concessioner and the Director and shall determine the value of the Leasehold Surrender Interest consistent with the terms of this CONTRACT, including without limitation Exhibit A. The arbitration panel shall also provide a means to calculate the change in the value of such Leasehold Surrender Interest as may occur for up to two (2) years from the date of the initial determination. The determination of the arbitration panel shall be binding on the Director and the Concessioner.

(d) Compensation for Personal Property

No compensation is due the Concessioner from the Director or a successor concessioner for the Concessioner's personal property used in operations under this CONTRACT. However, the Director or a successor concessioner may purchase such personal property from the Concessioner subject to mutually agreed upon terms. Personal property not removed from the Area by the Concessioner in accordance with the terms of this CONTRACT shall be considered abandoned property subject to disposition by the Director, at full cost and expense of the Concessioner, in accordance with Applicable Laws. Any cost or expense incurred by the Director as a result of such disposition may be offset from any amounts owed to the Concessioner by the Director to the extent consistent with Applicable Laws.

SEC. 18. ASSIGNMENT, SALE OR ENCUMBRANCE OF INTERESTS

(a) This CONTRACT is subject to the requirements of Applicable Laws, including, without limitation, 36 CFR Part 51, with respect to proposed assignments and encumbrances, as those terms are defined by Applicable Laws. Failure by the Concessioner to comply with Applicable Laws is a material breach of this CONTRACT for which the Director may terminate this CONTRACT for default. The Director shall not be obliged to recognize any right of any person or entity to an interest in this CONTRACT of any nature, including, but not limited to, Leasehold Surrender Interest or operating rights under this CONTRACT, if obtained in violation of Applicable Laws.

(b) The Concessioner shall advise any person(s) or entity proposing to enter into a transaction which may be subject to Applicable Laws, including without limitation, 36 CFR Part 51, of the requirements of Applicable Law and this CONTRACT.

SEC. 19. GENERAL PROVISIONS

(a) The Director and Comptroller General of the United States, or any of their duly authorized representatives, shall have access to the records of the Concessioner as provided by the terms of Applicable Laws.

(b) All information required to be submitted to the Director by the Concessioner pursuant to this CONTRACT is subject to public release by the Director to the extent provided by Applicable Laws.

(c) Subconcession or other third party agreements, including management agreements, for the provision of visitor services required and/or authorized under this CONTRACT are not permitted.

(d) The Concessioner is not entitled to be awarded or to have negotiating rights to any Federal procurement or service contract by virtue of any provision of this CONTRACT.

(e) Any and all taxes or assessments of any nature that may be lawfully imposed by any State or its political subdivisions upon the property or business of the Concessioner shall be paid promptly by the Concessioner.

(f) No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this CONTRACT or to any benefit that may arise from this CONTRACT but this restriction shall not be construed to extend to this CONTRACT if made with a corporation or company for its general benefit.

(g) This CONTRACT is subject to the provisions of 43 CFR, Subtitle A, Subpart D, concerning nonprocurement debarment and suspension. The Director may recommend that the Concessioner be debarred or suspended in accordance with the requirements and procedures described in those regulations, as they are effective now or may be revised in the future.

(h) This CONTRACT contains the sole and entire agreement of the parties. No oral representations of any nature form the basis of or may amend this CONTRACT. This CONTRACT may be extended, renewed or amended only when agreed to in writing by the Director and the Concessioner.

(i) This CONTRACT does not grant rights or benefits of any nature to any third party.

(j) The invalidity of a specific provision of this CONTRACT shall not affect the validity of the remaining provisions of this CONTRACT.

(k) Waiver by the Director or the Concessioner of any breach of any of the terms of this CONTRACT by the other party shall not be deemed to be a waiver or elimination of such

term, nor of any subsequent breach of the same type, nor of any other term of the CONTRACT. The subsequent acceptance of any payment of money or other performance required by this CONTRACT shall not be deemed to be a waiver of any preceding breach of any term of the CONTRACT.

(l) Claims against the Director (to the extent subject to 28 U.S.C. 2514) arising from this CONTRACT shall be forfeited to the Director by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof within the meaning of 28 U.S.C. 2514.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have executed this CONTRACT as of the _____ day of _____, _____.

CONCESSIONER

BY_____
(Title)
(Company Name)

[CORPORATIONS]
ATTEST:

BY:
TITLE: _____
_____

UNITED STATES OF AMERICA

BY_____
Director
National Park Service

[SOLE PROPRIETORSHIP]
WITNESSES:

NAME _____
ADDRESS _____
TITLE: _____

NAME _____
ADDRESS _____
TITLE: _____

[PARTNERSHIP]
WITNESSES AS TO EACH: [Concessioner]

NAME _____ (NAME)_____
ADDRESS _____

NAME _____ (NAME)_____
ADDRESS _____

* * *

Supplement B-1

GIFT SHOP MISSION STATEMENT

South Rim Facilities, Accommodations and Services
CC-GRCA001-01

Purpose

The purpose of Grand Canyon National Park is based on the legislation establishing the park and the legislation governing the National Park Service (NPS). As a place of national and global importance, Grand Canyon National Park is to be managed to:

- Preserve and protect its natural and cultural resources and ecological processes, as well as its scenic, aesthetic, and scientific values;
- Provide opportunities for visitors to experience and understand the environmental interrelationships, resources, and values of the Grand Canyon without impairing the resources.

The gift shops throughout the park play a primary role in assisting us to meet our management objectives by providing opportunities for visitors to purchase mementos of their park visit, and they serve as an extension of the park's interpretive efforts. The shops will allow visitors to take something of their park experience with them when they leave, by providing gifts and souvenirs that relate to the park and regional resources. The products sold have the potential to provide the visitor pleasant memories of his/her national park experience and further the understanding of preservation and related environmental and cultural values.

Objectives

1. The image of the park and the concessions operations are intertwined. Concessioner employees are prominent in interactions with park visitors, and should exemplify quality and professionalism. The concessioner will con-

tinue its training of retail personnel and other front line staff to be aware of the source, quality and authenticity of merchandise items. Training will also be provided to ensure that employees have a basic knowledge of general park information, and its cultural and natural attributes.

2. To the greatest extent possible, merchandise will have an identifiable relationship to Grand Canyon National Park, its environs, its natural/cultural history and other identified or related topics.

3. Themes have been identified to guide implementation of these objectives. Merchandise that does not relate to the identified themes or related topics will be phased out.

4. Merchandise with interpretive or educational value will be provided prominent display in gift shops.

5. Handcraft items representing park and regional themes will be developed through vendors or otherwise sought. Conversely, handcrafted items from other regions of the United States are not appropriate. Foreign-made merchandise is also discouraged.

6. Informational tagging will be attached to merchandise to assist in illustrating the importance of the merchandise to the park/region.

7. Merchandise representing the identified themes will be available within a broad price range. This will provide all visitors an opportunity to purchase both inexpensive or fine gifts and/or souvenirs. When appropriate fine art should be included within the merchandise inventories.

8. It is the concessioner's responsibility to select sales items that comply with this Mission Statement and general NPS merchandising guidelines. The NPS will not dictate the sale of specific merchandise based on individual tastes, however the National Park Service reserves the right to approve the nature, type, and quality of merchandise to

be offered. It is recognized that developing product lines with vendors, and finding appropriate merchandise will be an on-going process. Therefore, new inventory will be phased in over a period of time. Items that do not sell, regardless of how well they support park themes, may need to be phased out. The park and concessions staff will need to work closely to fine-tune this effort in order to make it beneficial for both entities.

9. These objectives are for gift and souvenir merchandise. It is recognized that the concessioner may also sell other general merchandise (if identified in their contract) which is necessary and appropriate to meet the visitors needs.

Themes

- Hopi House: Certified Native American Handcraft items that represent Native Americans of the Southwest. Special emphasis on historic use of the facility and artisans.
- El Tovar Hotel: First Harvey House at Grand Canyon. The beginning and early era of tourism in the area which should include the train. The Harvey Girl Tours are to be reinstated to compliment this theme.
- Bright Angel Lodge: Human history and development of trails in the park. Appropriate emphasis on Fred Harvey wranglers and mule use in the park. Fred Harvey Company History to compliment the Fred Harvey History Room.
- Lookout Studio: Geology of the area. Inspiration. Post cards, photography, posters, and other art-related items.
- Hermits Rest: Early history of the area which includes the stagecoach destination, trails development (Hermit, Boucher, Hermit Camp). Overall ambience should be that of a resting and gathering place.
- Watchtower: Certified Native American handcrafts that represent Native Americans of the Southwest. The Colo-

rado Plateau, river, and Painted Desert themes are appropriate to this facility. Emphasis on a resting and gathering place in the main kiva room.

- Desert View Trading Post/Maswik/Yavapai: Family oriented shops with general park-related themes that include wildlife, resources, children's educational merchandise, etc. Generally lower range prices at these facilities.
- General: Each historic facility should provide an area that includes educational information on the history of the facility (i.e., who designed, age of facility, historic use, etc.). The display and sales of copies of historic photos are strongly encouraged. These photos should be accompanied by descriptive literature.

* * *

PROPOSAL PACKAGE

CC-GRCA001-01

Department Of Interior
National Park Service
Grand Canyon National Park

Proposal to Operate South Rim Accommodations, Facilities and Services
Within Grand Canyon National Park

Date:
(Prospectus Issued)

DUE DATE: All proposals and any modifications of them must be received at the following address:

National Park Service
Business Resources Division
Intermountain Regional Office
P.O. Box 25287
Denver, CO 80225-0287

12795 W. Alameda Parkway
Lakewood, CO 80228

Phone No. 303/969-2661

No Later Than: _____
By Close Of Business: 4:00 P.M.

The Proposal Letter set forth below indicates your acceptance of the terms and conditions of the concession opportunity as set forth in this Prospectus. It indicates your intention to comply with the required elements of the Contract. The letter must bear original signatures. The NPS will review the entire Proposal Package to determine whether your proposal in fact accepts without condition the terms and conditions of this Prospectus. If not, your proposal may be considered non-responsive, even though you submitted an unconditional Proposal Letter.

If a court of competent jurisdiction determines that any term of the prospectus is unlawful, then any Offeror may withdraw its proposal at any time prior to award of the Contract without penalty and may submit a new proposal in accordance with any amendment to, or resolicitation of, the Prospectus.

PROPOSAL FOR CONCESSION OPERATION

To: Karen Wade, Director
Intermountain Region
P.O. Box 25287
Denver, Colorado 80225

Attention: Business Resources Division (IMDE-CM)

Dear Ms. Wade:

(I) (We) hereby offer to provide visitor services and facilities at Grand Canyon National Park in accordance with the terms and conditions specified in the draft new Concession Contract No. CCGRCA001-01, provided in the prospectus issued by the public notice in the Commerce Business Daily dated _____, and to execute the draft new Cqncession Contract without substantive modification (except as may be required by the National Park Service pursuant to the terms of the prospectus).

(I) (We) are enclosing the required "PROPOSAL" which, by this reference, is made a part hereof. (I) (We) certify that the information furnished herewith is true to the best of (my) (our) knowledge and belief. (I) (We) agree to meet all the minimum requirements of the draft new concession contract, and the prospectus, and that (I) (We) have provided all of the mandatory information specified in the prospectus.

(I) (We) certify in accordance with 43 CFR Part 12 regarding debarment, suspension, ineligibility and voluntary exclusion the following:

Any of the individuals or entities seeking participation in this Concession Contract are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from a public transaction by a federal department or agency.

Within the three years preceding submission of the Proposal, none of the individuals or entities seeking participation in this Concession Contract have been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or contract under a public transaction, or for violation of federal or state antitrust statutes or for commission of embezziement, theft, forgery, bribery, falsification of records, making false statements, or receiving stolen property.

None of the individuals or entities seeking participation in this Concession Contract are presently indicted for or otherwise criminally or civilly charged by a federal, state or local unit of the government with commission of any of the offenses.

The individuals or entities seeking participation in this Concession Contract have not had one or more public transactions (federal, state or local) terminated for cause

or default within the threeyear period preceding the submission of the Proposal.

(I) (We), by submitting this Proposal hereby agree, if selected for award of the new concession contract:

1. To the minimum requirements of the prospectus as identified in Part A of this proposal package.
2. To complete the execution of the final Concession Contract within thirty working days after it is presented by the National Park Service.
3. To commence operations under the new concession contract on the effective date of the new concession contract.
4. To acquire the possessory interest of the existing concessioner no later than December 31, 2001 in the amount of $165,000,000.
5. To acquire the personal property of the existing concessioner under the terms of the existing concession contract.
6. To resolve any dispute regarding the value of personal property of the existing concessioner in accordance with the terms of the existing concession contract.
7. To the conversion of the possessory interest held under the existing concession contract to leasehold surrender interest under the terms of the new concession contract in accordance with the applicable provisions of Subpart H of 36 CFR Part 51.

BY _____ DATE_____
(Type or Print Name)
ORIGINAL SIGNATURE _____
TITLE _____
ADDRESS _____
_____

CERTIFICATE OF CORPORATE OFFEROR

(Offerors who are not corporations should skip this certificate)

I, _____, certify that I am the _____ of the corporation named as Offeror herein; that , who signed this proposal on behalf of the Offeror, was then of said corporation; that said proposal was duly signed for and in behalf of the corporation by authority of its governing body within the scope of its corporate powers.

BY:_____
DATE_____
(Type or print name and date)

_____
Original Signature

TITLE _____

ADDRESS_____

_____

PART A

The minimum requirements for the new concession contract are identified in this Part A of the proposal package. If the offeror, in its proposal letter, does not agree to these minimum requirements, the proposal will be considered non-responsive.

PRINCIPAL SELECTION FACTOR 1. THE RESPONSIVENESS OF THE PROPOSAL TO THE OBJECTIVES, AS DESCRIBED IN THE PROSPECTUS, OF PROTECTING, CONSERVING, AND PRESERVING RESOURCES OF THE PARK AREA.

(I) (We) agree to comply with all terms and conditions in the contract, including compliance with all applicable laws, including, without limitation, environmental protection and conservation laws, under the terms and conditions specified in the Concession Contract.

PRINCIPAL SELECTION FACTOR 2. THE RESPONSIVENESS OF THE PROPOSAL TO THE OBJECTIVES, AS DESCRIBED IN THE PROSPECTUS, OF PROVIDING NECESSARY AND APPROPRIATE VISITOR SERVICES AT REASONABLE RATES.

(I) (We) agree to comply with all the terms and conditions specified in the Concession Contract, including its exhibits.

(I) (We) agree to operate at the currently approved rates during the term of the Concession Contract until such time as a new rate schedule is approved by the Secretary, in accordance with 16 U.S.C. 5955. A selected Offeror may request a rate increase at any time after the selection of the best proposal is made by the National Park Service. The last comprehensive rate study for lodging, food and beverage was undertaken in 1995.

(I) (We) agree to accept the Concession Facilities, and any assigned government personal property "as is" as required by the draft Concession Contract, Section 8(f).

(I)(We) agree to carry out the required Concession Facilities Improvement Program according to the terms of the draft Concession Contract, including the time frames established by the Secretary.

(I)(We) agree to accept the "Repair and Maintenance Reserve" described in the draft Concession Contract as it now exists, including the administrative responsibilities associated with the funds.

(I) (We) accept without condition the proposed Maintenance Plan included as Exhibit F of the draft Concession Contract.

(I) (We) accept without condition the Operating Plan included as Exhibit B of the draft Concession Contract.

(I) (We) agree to implement an equal opportunity program and comply with the terms of the Equal Opportunity and handicapped access requirements of the draft Concession Contract.

(I) (We) agree to develop and implement an effective health and safety program (Risk Management Program), according to the requirements of the draft Concession Contract for such programs.

(I) (We) agree to meet the public liability and property insurance requirements of the draft Concession Contract and agree to provide property and liability insurance of at least the types and levels of coverage described in the draft Concession Contract.

PRINCIPAL SELECTION FACTOR 5. THE AMOUNT OF THE PROPOSED MINIMUM FRANCHISE FEE, IF ANY, AND/OR OTHER FORMS OF FINANCIAL CONSIDERATION TO THE DIRECTOR.

(I) (We) agree to the minimum Franchise Fee of three and

eight-tenths (3.8%) of annual gross receipts, and agree to pay any higher franchise fee offered in our proposal that may be accepted by the National Park Service.

PART B

Offerors must agree, in their proposal letter, to the minimum requirements identified in Part A of this proposal package, and must provide the information required by the following Part B subfactors to be considered responsive.

PRINCIPAL SELECTION FACTORS

PRINCIPAL SELECTION FACTOR 1. THE RESPONSIVENESS OF THE PROPOSAL TO THE OBJECTIVES, AS DESCRIBED IN THE PROSPECTUS, OF PROTECTING, CONSERVING, AND PRESERVING RESOURCES OF THE PARK AREA.

Subfactor B1(a) The National Park Service is committed to the conservation, protection and preservation of the natural and cultural resources of Grand Canyon National Park. In complying with all applicable laws relating to the protection, conservation and preservation of these resources, please address how you are going to comply with park specific policies and planning documents.

1. Many concession facilities are historic structures that are listed or eligible for listing on the National Register of Historic Places. All repair, rehabilitation and construction having an effect on cultural resources requires Section 106 consultation with the State Historic Preservation Officer.

   a. How will you ensure that the integrity of these facilities is maintained?

   b. What types of specialized training will be provided to staff responsible for maintaining these facilities?

   c. How will you ensure that no repair, rehabilitation or construction is initiated prior to appropriate consultation with the State Historic Preservation Officer?

2. Concession operations have potential to adversely impact the natural resources of the park.

   a. How will you ensure that ground-disturbing activities have been previously approved by the National Park Service?

   b. How will you ensure that your operations or employees' activities do not adversely impact park resources, i.e., parking cars outside parking areas; excessive grease getting into sewer system; hazardous materials spills, etc.?

Subfactor B1(b) Please identify your environmental program manager, and provide a brief description of his/her qualifications and past experience with regard to managing an environmental program. If the environmental program manager has not yet been selected, please identify the training and experience factors you will take into consideration in selecting the individual to fill this position.

Subfactor B1(c) The reduction of pollution and the use of toxic products in the park, within the constraints of U.S. Public Health Service codes, is an objective of the National Park Service. One method for doing so, that has been adopted by the National Park Service at Grand Canyon, is the use of environmentally preferable cleaning products for custodial, housekeeping and fleet operations. Primary products utilized for these purposes are naturally derived from renewable resources. Products that are toxic, skin irritants, flammable, corrosive, non-biodegradable, or that contain high VOC levels, petroleum and hydrocarbons, ozone-depleting, chlorinated compounds or artificial dyes and fragrances should be avoided.

Please describe, in narrative form, your commitment to this important objective and your specific plans for reducing or eliminating the use of toxic products.

1. Identify which of the departments you will convert to use of environmentally-preferable cleaning products and a timetable for each conversion.
2. How do you intend to identify products that meet the above criteria? What documentation will you require of the supplier?
3. Who on your staff will be responsible for monitoring this program? What are their qualifications to do so?

Subfactor B1(d) Submit with your offer a draft Environmental Management Program(EMP) for this operation, addressing the elements identified in the draft CONTRACT Section 6, Environmental and Cultural Protection. The Draft EMP will document processes and procedures to be established that ensure compliance with Applicable Laws related to protection, conservation and preservation of the environment.

Natural and cultural resources and associated values of Grand Canyon National Park are protected, restored and maintained in good condition and managed within their broader ecosystem and cultural context. Specific objectives in the concessioner's EMP should include:

- Hazardous Materials and Waste Management
- Solid Waste Management (including recycling and composting where appropriate)
- Water and energy conservation
- Fuel storage and delivery systems must meet all applicable requirements including underground and aboveground storage
- Emergency Planning and Response
- Pollution Prevention and Waste Reduction

- Reduction of emissions from vehicle and other operations that affect Air Quality
- Protection of water quality
- Protection of night skies from light pollution
- Reduction of noise and protection of natural sounds
- Pest management practices
- Sustainable design and construction practices
- Use of native species

PRINCIPAL SELECTION FACTOR 2. THE RESPONSIVENESS OF THE PROPOSAL TO THE OBJECTIVES, AS DESCRIBED IN THE PROSPECTUS, OF PROVIDING NECESSARY AND APPROPRIATE VISITOR SERVICES AT REASONABLE RATES.

Subfactor B2(a) Provide your specific plans for each of the services required by the Contract. Remember that the more complete and well-thought-out your plans, the better support you give to your required agreement to the statements in Part A.

Subfactor B2(b) Please provide the following information regarding your intention in implementing the Concessions Facilities Improvement Program required in the draft concession contract.

The estimates given in the Contract for costs involved in this program are Class "C" estimates. Class C estimates are conceptual cost estimates based on square foot costs of similar construction, or on identifiable known unit costs of similar construction items. Class C estimates are usually prepared before a fully defined scope of work is developed, and they consider such factors as job location, unusual site conditions, sources of materials and supplies, and the availability and skills of local labor pools.

1. Describe your proposed construction schedule for each of the projects required by the Concession Facilities Improvements Program.

   a. How do you propose to approach the planning, design and construction process?

   b. What is your projected construction cost for each of these projects?

Subfactor B2(c) The Offeror must accept the proposed maintenance plan without condition. The draft contract requires the new concessioner to maintain the facilities and assigned lands to the satisfaction of the Director and in accordance with the maintenance plan attached to the draft contract.

If you could make changes to the Maintenance Plan that would improve services to the visitors with respect to maintenance, please describe any additions or changes that you would propose to make. You can agree to accept the proposed Maintenance Plan without condition, as required in Part A, and still answer this question.

Subfactor B2(d) The Offeror must accept the proposed operating plan without condition. The draft contract requires the new concessioner to operate the facilities and services to the satisfaction of the Director and in accordance with the operating plan attached to the draft contract.

If you could make changes to the Operating Plan that would improve services to the visitors with respect to operations, please describe any additions or changes that you would propose to make. You can agree to accept the proposed Operating Plan without condition, as required in Part A, and still answer this question.

Subfactor B2(e) Submit a draft Risk Management Plan to address the elements of an effective health and safety program (Risk Management Program), according to the requirements of the draft contract for such a program. This plan must address the following:

- Management's Policy Statement, Duties, Employees' Responsibilities, and Administration
- Program administration (responsibilities, goals, resources, etc.)
- Inspection and Abatement
- Deficiency Classification and Hazard Abatement Schedules
- Accident Investigation and Reporting
- Public Safety Awareness and Promotion
- Safety/Health Committee
- Training
- Emergency Procedures

Subfactor B2(f) Employee Training. Concession employees are often a primary source of visitor information about park resources.

1. How will you train your employees about the purpose and significance of Grand Canyon National Park, its surrounding area and the National Park Service?

2. How will you train your employees to provide information to visitors? Recognizing that certain employees will have more contact and more responsibility in this area, what will be the minimum level of training you provide to all employees? What types of training will you provide to employees with more public contact, such as wait staff, retail clerks and service station attendants? What training will you provide to employees with direct interpretive responsibilities, such as tour guides and wranglers?

3. What kind of interpretive cross training with the National Park Service would be useful to your staff?

4. If the National Park Service initiates cross training on interpretive topics, will you participate?

Subfactor B2(g) The National Park Service wishes to continually upgrade gift and souvenir operations to focus more on the park's related themes. Merchandise should enhance appreciation and understanding of the park and the National Park System, the significance of the natural world and environment, and set a model of environmental responsibility. The draft Contract requires that the concessioner develop and implement a plan satisfactory to the Director that will assure that gift merchandise to be sold or provided reflects the purpose and significance of the park, including conservation of resources, geology, wildlife, plant life, archeology, local Native American culture, local ethnic culture, and historic significance.

a. Consider how your merchandising program will fulfill the goals of the Gift Shop Mission Statement, Supplement B-3 to the Draft Operating Plan. How will you approach developing store themes and decors, as well as the necessary policies and sources of merchandise to successfully effect this program? Include specifically how you will acquire and present merchandise that represents the cultural diversity of the tribes associated with this area.

b. Provide ideas or sample products or descriptions of interpretive methods, media and/or material you propose to provide.

c. Propose any changes which you believe would improve the Gift Shop Mission Statement, Supplement B-3 to the Draft Operating Plan. You can agree to accept the proposed Operating Plan without condition, as required in Part A, and still answer this question.

Subfactor B2(h) It is the goal of the NPS to provide every visitor with multiple opportunities to learn about features of Grand Canyon National Park and their significance. Submit your plan for interpretive programs, and for training your employees in providing these programs.

How do you plan to integrate interpretive messages or activities into every suitable aspect of your operation? In your response, include how you intend to deliver interpretive information about the relationship between concessioners and the NPS, Grand Canyon cultural and natural resources, park resource protection, and safety issues. Provide ideas or sample products or descriptions of interpretive methods, media, and/or material you propose to provide.

PRINCIPAL SELECTION FACTOR 3. THE EXPERIENCE AND RELATED BACKGROUND OF THE OFFEROR, INCLUDING THE PAST PERFORMANCE AND EXPERTISE OF THE OFFEROR IN PROVIDING THE SAME OR SIMILAR VISITOR SERVICES AS THOSE TO BE PROVIDED UNDER THE CONCESSION CONTRACT.

Subfactor B3(a). Describe the entity with which the National Park Service will contract. Clearly define the Offeror's relationship to any superior and/or subordinate entities.

Using the format and instructions on the next two pages identify the Offeror and each business organization, operator and any parties involved in management of the proposed concession operation. Add information necessary to make the relationships clear.

The following three elements give an overview of the information requested in this section.

1. Identify the "Offeror" formally. Has this business organization been in existence for some time, is it new, or do you propose to establish it?

2. Explain the financial circumstances, legal form, formal structure and ownership of the primary business organization that would provide the services advertised if your proposal is chosen. Identify any related, subordinate or superior business organizations and any other organizations, contractors, or subcontractors that will have a substantial role in managing,

directing, operating, or otherwise carrying out the services to be provided. If the business organization is to be created, what guarantees will be provided by the entity submitting the proposal?

3. Identify any layers of related, subordinate or superior entities, significant contractors/subcontractors, or other organizations or individuals that will act in concert to provide the services required. Describe each of them and their relationships.

Support for Subfactor B3(a):

Provide an organizational chart showing the principal lines of authority within your primary business organization. Specify any related, subordinate, or superior business organizations or any other organizations, contractors, or subcontractors identified within subfactor 3(a) above.

* * *

APPENDIX 1. THE NATIONAL PARK SERVICE AND ITS MISSION

America's National Park Service was created by Congress to "... conserve the scenery and the natural and historic objects and the wild life therein, and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations." Additionally, the Congress has declared that the National Park System should be, "... preserved and managed for the benefit and inspiration of all the people of the United States." The National Park Service has as its overall mission the preservation and public enjoyment of significant aspects of the nation's natural and cultural heritage.

The National Park Service is an agency (bureau) of the Department of the Interior. The Department of the Interior, through its various bureaus, has responsibility for much of our nationally owned public lands and natural and cultural resources. This includes fostering wise use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historical places, and providing for the enjoyment of life through outdoor recreation. The department also encourages stewardship and citizen responsibility for the public lands and promotes citizen participation in their care.

The National Park Service is managed by its Director who makes its policies under the direction of the Secretary of the Interior and through the Assistant Secretary, Fish and Wildlife and Parks. The Director seeks advice on policy and other concession-related matters from his Office of Concession Management. This office includes branches for financial, contracting, and planning and program matters.

CONCESSION PROGRAM MANAGEMENT

Concession Contract Management

As one of the means by which the public can be provided the facilities and services they need to enjoy national park areas, Congress has established a concession program in the National Park Service through the National Park Service Concessions Management Improvement Act of 1998. Title 36 of the Code of Federal Regulations contains important regulations for the preservation of the parks and administration of concession operations (36 CFR 51). Concession activities are also subject to Management Policies of the National Park Service.

The Secretary of the Interior, and those to whom he has delegated authority, are authorized to enter into concession contracts and permits. The National Park Service may provide "necessary and appropriate" facilities and services that are desirable for the visiting public through concession contracts.

These services include a wide variety of commercial visitor services from backcountry guiding to first class hotel operations. All are provided by private corporations, partnerships, individuals, or other entities under contract with the National Park Service. All exist for the purpose of providing park visitors with the services and accommodations that are necessary and appropriate for their full enjoyment of America's National Park Service-administered areas. The determination of what facilities and services are necessary and appropriate is made through the National Park Service's planning process. Needs vary with the purposes of the various park areas and their individual circumstances at the time of contracting.

The preceding description covers only the primary laws directly affecting the management of a National Park Service concession. Many other federal statutes apply. State and local laws and regulations may also apply depending on the nature

of park jurisdiction. Some areas are exclusively federal in jurisdiction while others involve state and local jurisdiction.

The services to be provided under this contract are to be performed under the applicable laws, regulations, policies, and planning existing now or established during the term of the contract.

Concession contracts are issued under regulations unique to the National Park Service Concession Management Program. They are not subject to the Federal Acquisition Regulations (FAR).

Concession Program Management

The NPS Concession Program represents the interests of the National Park Service through three subdivisions: park, regional and Washington offices including the Concessions Program Center in Denver.

At each park there is, at the least, an individual assigned the task of being the concessioner's immediate contact. This may be a part-time duty in a park where concession activities are minor in nature. For parks with larger operations, a full-time staff will manage the park's immediate relationship with its concessioners and support the park superintendent.

For management purposes, the National Park Service is divided into seven regions, each with an office of the Regional Director. Each Regional Director's office has a System Support Office providing various technical functions including an Office of Concession Program Management. This concession management group provides advice to the region's parks and to the Regional Director and provides a variety of support to parks for contracting and other work.

In Washington, D.C., a staff of specialists makes policy recommendations to the Director and manages problem issues. This office is under the leadership of the Concession Program Manager, National Park Service. This office is part of

the Park Operation and Education subdivision of the Washington office.

The Concession Program Center (CPC), located in Denver, CO, provides nationwide assistance in a variety of subjects relating to the concession management program. The CPC does feasibility studies, calculates insurance replacement cost values, carries out concession planning as separate assignments or as part of overall park planning teams, and undertakes a variety of special projects required to serve park goals.

Program Management - Operating Programs and Practices

Concessioners in the national parks join with the National Park Service in carrying out a part of the Service's mission. While the role of a concessioner must include well defined business-oriented goals and management, in order for the relationship to be successful the concessioner must also adopt the goals of the park as its own and make the achievement of park objectives for visitor service and other matters part of the concessioner's objectives.

Concessioners and their staffs are important members of the park community. Park visitors often have more contact with and receive more information from concession employees than park staff. These contacts can have a significant effect on the quality of the visitor's experience. Concessioners often occupy important historic structures and have, through their operations, meaningful effects on park resources.

To manage all these effects, Concession Program Management in the National Park Service has developed operating programs and practices. These allow the Service to supervise concessioner activities in an orderly way and establish certain unique approaches to conducting hospitality and recreation services in the National Park System.

Resource Protection Considerations. The National Park Service expects its concessioners to join with the Service in fulfillment of its mission, and to give special attention in their operations to the preservation, conservation, and protection of park resources and the environment.

Routine business operations, educational activities and employee programs must be conducted in accordance with all applicable environmental laws, and in a manner and by such methods that minimize negative environmental impacts on the parks and that encourage others to do the same. In this way, a concessioner can participate with the Service in its environmental leadership role.

Appropriate participation in such activities is an evolving agenda. Issues and technologies change over time. The following provide some idea of the Service's current agenda.

1. Solid waste disposal is a major environmental issue as well as a costly problem. The concessioner will be expected to reduce, reuse, and recycle. The new concessioner should actively work to reduce the amount of trash and waste generated, to acquire products with consideration given to the ability to reuse or recycle the product and its packaging, and to recycle all materials possible. An approach that minimizes such trash and ensures recycling where possible is necessary.
2. Water and energy conservation must be practiced in daily operations and incorporated into the design and construction of both rehabilitated and new facilities.
3. Concessioner-operated underground and above ground tanks for building and vehicle fuels, whether Government or Concessioner owned, must meet all of the requirements of Federal, state, and local law and regulation. Responsibilities include cleanup of spillage or leaks, demonstration of financial responsibility, and fulfillment of reporting requirements.

4. The effect of vehicles and other operations on air quality is of concern to the National Park Service. Fuel and engine technology is evolving in ways that will benefit air quality. Concession operations should adapt their operations to such changes as they are proven to be reliable and effective.
5. Operations may be conducted in a natural area with a variety of wildlife. The new concessioner must conduct its operations under Service direction for mitigating human-wildlife interactions.
6. Employee orientation programs and development must genuinely emphasize the importance of the park's natural and cultural resources and the necessary consideration for them due from all employees.
7. The Integrated Pest Management Program ensures that use of chemicals to control plant and insect pests is strictly regulated to minimize such uses and that such applications are the last resort in control efforts. The concessioner must work with the park in implementation of this program in its operations and in the areas for which it is responsible.

The overall objective of Resource Protection is to conduct operations in a steadily evolving way oriented towards the use of efficient and cost-effective approaches that minimize negative impacts on our environment and to encourage others to do so too, for the same cost-effective and self-protective reasons.

Construction. Construction of all kinds should harmoniously integrate with the environment where it is located. Facilities that are cultural resources should be managed so as to maintain their intrinsic qualities through sustained conservation. Architectural style, design elements and construction materials should reflect the park and its history.

Plans and specifications for any and all construction and landscaping development on government-owned lands assigned to the new concessioner must be approved in writing by the National Park Service before the work may be started. Plans must be prepared in accordance with National Park Service Drafting Guideline (NPS-10), which will be made available upon request. The National Park Service microfilms all plans for retention.

Construction codes to be followed are nationally applicable codes such as the Uniform Building Code and the National Fire Protection Association codes, including the National Fire Code, in the latest editions. Regional and local codes are followed where they set a higher standard than national codes or address unique issues. Even where park jurisdiction requires local codes to apply, higher standards in national codes will be used for concessioner construction.

The seismic safety standards to be applied to new buildings designed and constructed within the National Park Service System are:

1. 1991 International Conference of Building Officials Uniform Building Code.
2. 1992 Supplement to the Buildings Officials Conference of America National Building Code.
3. 1992 Amendments to the Southern Building Code Congress Standard Building Code.
4. State, county, and local jurisdictions having specific seismic safety standards.

Interpretation. The National Park Service expects that its concessioners will, in appropriate ways, interpret park natural and cultural resources, to park visitors and concession employees, with the objective of instilling in them an appreciation of the park area. Concessioner interpretive messages should include safety, local resource management issues and objectives, history of the area, and interpretive themes identified in the park's Interpretive Prospectus. These opportunities

and responsibilities are more specifically identified in the contract and operating plan for this operation.

Rates For Services. Rates and prices charged are subject to prior approval of the National Park Service. Reasonableness and appropriateness of rates and charges will be determined primarily by comparison with those rates and charges for facilities, goods, and services of comparable character under similar conditions, with due allowances for length of season, provision for peak loads, accessibility and cost of labor and material, and type of patronage with consideration given to other factors deemed relevant (See PL 105-391). The National Park Service concession rate approval program identifies several methods by which comparable rates may be established. It is the responsibility of the regional director to approve the method used and the responsibility of the superintendent to approve rates.

To reduce government expenses, the concessioner will be required to provide reduced rates for lodging and transportation to government employees on official business. Reduced rates under this program may only be provided for lodging and transportation. All other rates for all other goods and services are to be charged to all government employees and their dependents in the same manner as to general park visitors.

Equal Opportunity. The Service is interested in having its concession operations reflect, through its employees, the cultural and ethnic diversity of the area in which they operate and of the nation as a whole. The Service is also interested in having participation in the management of the new concession by minority and women professionals. The Service believes that a varied and diverse concession workforce will better serve the increasingly varied and diverse clientele that uses the Nation's national park areas. A participation program for minority and women employees that advances these

goals is very desirable. Provisions of the contract address this goal.

Facility and Service Accessibility. The concessioner will be required to comply with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) for buildings and facilities. Compliance with ADAAG meets all accessibility requirements under the Americans With Disabilities Act and Section 504 of the Rehabilitation Act.

An offeror must demonstrate a commitment to full participation for persons with disabilities. This commitment must represent opportunities for both mainstreaming individuals into the normal use patterns of concession facilities as well as the willingness to provide specialized accommodation and programs.

The Service recognizes that there are significant variations among concession activities as to the possible range of accessibility and accommodation. However, each concessioner will be expected to handle accessibility issues and inquiries in a supportive and assisting manner that provides maximum opportunities for persons of all abilities.

Utilities. Where utility services are readily available, concessioners will be required to obtain them from local sources. In other circumstances, the National Park Service may furnish utilities to concessioners. Rates for services furnished by the National Park Service shall be based on actual operating costs (excluding capital investments) or comparability to areas used in establishing visitor rates, whichever is greater. In the event actual costs exceed comparability, the amount of difference may be passed on to the visitor through the rate approval process. Requests to pass on such additional actual costs must be approved in advance by the superintendent.

Maintenance Plan. The maintenance plan provides park-specific information about required maintenance. The parks will describe the interaction of park maintenance activities

with concessioner activities and will specify and describe any maintenance tasks unique to the particular park that must be performed by concessioners and those, if any, that will be the responsibility of the National Park Service.

The concessioner generally will be required to maintain, repair, and perform improvements on all assigned concession facilities, including cyclic maintenance, grounds maintenance, landscaping, and all necessary "housekeeping" activities associated with the concession operation, to the satisfaction of the National Park Service. The National Park Service in consultation with the concessioner, will determine the specific maintenance responsibilities, and establish priorities and projected completion dates.

The maintenance plan is initiated at the park level and signed by the park superintendent. Typically, superintendents will ask concessioners to consult on the content of such plans. Such plans may not alter provisions in the body of the contract document or Service policy.

The initial maintenance plan is an exhibit to the contract. A plan must be signed by the successful offeror at the time that the contract is signed. It will be reviewed on no less than an annual basis, and changes will be made as determined appropriate by the National Park Service.

Operating Plan. The operating plan includes such details about the operations as are necessary for the concessioner and the National Park Service to operate smoothly together, and provides the concessioner with information as to what specific operating practices are considered satisfactory in the circumstances of a particular park.

Operating plans include such things as hours of operation, scope and quality of service, management information, lost and found procedures, reservations, advance deposits, cancellations and refund policy, convention policy, rates, safety, sanitation, security, and health care, concession employees

and employment, complaint review process, prior notification of changes in key management staff, and other areas of concern.

The operating plan is initiated at the park level and signed by the park superintendent. Typically, superintendents will ask concessioners to consult on the content of such plans. Such plans may not alter provisions in the body of the contract document or Service policy.

The initial operating plan is an exhibit to the contract. A plan must be signed by the successful offeror at the time that the contract is signed. It will be reviewed on no less than an annual basis, and changes will be made as determined appropriate by the National Park Service.

Environmental Management Program. The Environmental Management Program provides parkspecific information about the concessioner's role in providing its services in an environmentally sensitive manner. Environmental management programs include such topics as hazardous waste management, (etc.)

The successful offeror must submit the initial environmental management program for approval by the National Park Service within 60 days after the effective date of the contract. The approved program must be adhered to by the concessioner. It will be reviewed on no less than an annual basis, and changes will be made as determined appropriate by the National Park Service.

Sale of Souvenirs and Handicrafts. The selection and sale of gifts, souvenirs, and handicrafts in areas administered by the National Park Service is restricted in certain ways by National Park Service policies. The selection of items is limited to those that are appropriate for the public use and appreciation of the park. The sale of appropriate handicrafts associated with or interpretive of an area is especially encouraged. The concessioner will work with the park and its interpretive

staff to determine what sorts of merchandise are most appropriate for the park area.

Insurance. The proposed contract requires the concessioner to insure any buildings, structures, equipment, furnishings and betterments, and merchandise used in the operation. Full replacement value coverage is required for facilities needed by the park to serve the visitor.

In addition, the concessioner must carry liability insurance adequate for the types of activities it conducts.

The contract requires the new concessioner to purchase and maintain various types of insurance. Minimum coverage limits, as required, are provided in the appendix.

Historic Preservation and the National Register of Historic Places. Some facilities used by concessioners are on or may be eligible for the National Register of Historic Places. They are required to be maintained in accordance with the Secretary's Standards for Historic Preservation. This can be more time consuming and expensive than operations in non-historic buildings.

If such facilities will be used by the concessioner under this contract, requirements will be more fully described in the applicable contract. The preferred approach is to use a Historic Structures Report as a source for significance, and a Historic Structure Preservation Guide to become aware of maintenance techniques and standards. If such documents do not exist for these facilities, more detailed project consultation will be required prior to working on the affected buildings. Carrying out such maintenance requires specially trained maintenance staff.

Compliance with Federal State and Local Laws. Concessioners operate on Federal land but within the jurisdictional framework established by the application of park jurisdiction. Federal statutes apply to concession operations. State and local laws and regulations may also apply.

Concessioner Risk Management Program. The concessioner will develop, maintain, and implement a documented risk management program. This written program describes procedures, policies, and documentation for a process to minimize incidents and accidents that will affect the visitor, concession employees and the facilities. The program shall include the following elements appropriate to the size and scope of the required services:

a. Management's Policy Statement, Duties, Employee's Responsibilities, and Administration.
b. Inspection and Abatement
c. Accident Investigation and Reporting
d. Safety/Health Committee
e. Training
f. Emergency Procedures

Program Management - Financial Programs and Practices

The intention of the National Park Service is to contract with private businesses and individuals to conduct concession activities that are necessary to achieve park goals rather than to have the government conduct those activities directly. The National Park Service generally requires the payment of a franchise fee based on the probable value of the opportunity provided by the government.

Concessioner Pays Operating Costs. The costs of operation should be covered by the concessioner as agreed to in the concession contract. Concessioners should not expect that the National Park Service will reduce fees or otherwise underwrite costs and unexpected events.

Real Property in a Park Belongs to the National Park Service. If real property improvements are made, the title to them will belong to the United States. However, under the terms of the applicable Contract, the United States may have an obligation to compensate a concessioner in the future for

those real property improvements. This obligation to compensate is referred to in the contract as "leasehold surrender interest."

Real Property Outside the Park Belongs to the Concessioner. Concessioners who invest in real property outside of federal lands for the purposes of supporting in-park operations are not obliged to sell that property to any incoming concessioner. The government will not compensate concessioners for such property or require any incoming operator to purchase such property.

Personal Property Belongs to the Concessioner. Concessioners, not the government, are the owners of most types of personal property. The government will not require any successor concessioner to purchase such personal property.

Businesses May Have a Limited Sale Value. Concession businesses may not be sold without the approval of the National Park Service. Policies and procedures are described in 36 CFR 51, Subpart J. Among other matters, these policies require that the National Park Service make certain findings before approving a sale or transfer.

Fair Return for the Operator. There is no guarantee of any profit or of a profit in any given year. It is the responsibility of the offeror to assure itself that the terms of its offer provide it a reasonable opportunity for profit.

Franchise Fee. A concession operation exists, first and foremost, to serve park visitors. Public Law 105-391, defines the franchise fee as follows:

> A concessions contract shall provide for payment to the government of a franchise fee or such other monetary consideration as determined by the Secretary, upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved. Such probable value shall be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park areas and of providing necessary and appropriate services for visitors at reasonable rates.

Concessioner Review Program. The regional director, through the park superintendent and his/her designated representatives, will maintain a continuing review of concession operations and management. This continuing review will determine if the concessioner is complying with all provisions of the contract and will evaluate the concessioner's operation to determine if satisfactory performance as required by Public Law 105-391 is being provided. This concessioner review program will include, but not be limited to:

1. The quality of the service rendered to the public;
2. The prices that are charged the public;
3. The condition of the premises;
4. The appearance and conduct of employees;
5. The degree to which facilities are properly maintained and repaired as required by the particular concession authorization;
6. The nondiscrimination policies of the concessioner with relation to both employment and service to the public;
7. Compliance with the Concessioner Risk Management Program;
8. Compliance with U.S. Public Health Service standards and requirements and state and local health codes that may be applicable;
9. Compliance with practices that foster a safe environment for the public; and
10. Compliance with the various administrative and financial requirements of the contract, including any applicable construction program.

Periodic written evaluations will be prepared by the applicable park, usually two or three times a year, following the procedures and requirements of the National Park Service concessioner review program.

From these evaluations an annual rating is established. Failure to operate in a manner satisfactory under the requirements of the concessioner review program may be cause for termination of a concession authorization.

* * *

APPENDIX 4: 2001 NPS MANAGEMENT POLICIES

Chapter 10: Commercial Visitor Services

The National Park Service will provide, through the use of concession contracts, commercial visitor services within parks that are necessary and appropriate for visitor use and enjoyment. Concession operations will be consistent with the protection of park resources and values and demonstrate sound environmental management and stewardship.

Public accommodations, facilities, and services must be consistent to the highest practicable degree with the preservation and conservation of park resources and values.

10.1 General

Commercial visitor services will be authorized through concession contracts or commercial use authorizations, unless otherwise provided by law. Section 10.2 addresses concession authorizations. Section 10.3 addresses commercial use authorizations.

(Also see Director's *Orders #48A: Concessions Management, and #48B: Commercial Use Authorizations)*

10.2 Concessions

10.2.1 Concession Policies
Concession operations are subject to the provisions of the National Park Service Concessions Management Improvement Act of 1998; National Park Service regulations published at 36 CFR Part 51; this chapter of NPS Management Policies; and Director's Order #89A: Concession Management, and other specific guidance that may be issued under the Director's authority.

10.2.2 Commercial Visitor Services Planning
Commercial visitor services planning will identify the appropriate role of commercial operations in helping parks to achieve desired visitor experiences, and will be integrated into other plans and planning processes.

Concession management plans or commercial services plans will support a park's purpose and significance, exceptional resource values, and visitor experience objectives, and will be consistent with enabling legislation. These plans will also determine whether proposed concession facilities and services are necessary and appropriate, and will consider alternatives. Proposed concession operations must be economically feasible and generally supported by a feasibility study prepared by a qualified individual. Any concession facilities improvement program, or any service authorized in a concession contract, will be in conformance with the appropriate approved plan(s) for the area being considered. A decision to authorize a park concession will be based on a determination that the facility or service:

- Is necessary and appropriate for the public use and enjoyment of the park in which it is located, and identified needs are not, nor can they be, met outside park boundaries;
- Will be provided in a manner that furthers the protection, conservation, and preservation of the environment and park resources and values;
- Incorporates sustainable principles and practices in planning, design, siting, construction, utility systems, selection and recycling of building materials, and waste management; and
- Will enhance visitor use and enjoyment of the park without causing unacceptable impacts to park resources or values.

The number, location, and sizes of sites assigned for necessary facilities will be the minimum necessary for proper and satisfactory operation of the facilities, emphasizing compatibility of design; preservation of esthetic values, and natural and cultural resources; and integration of sustainable design concepts. For information about leasing historic structures for concession purposes, see Director's Order #38: Real Property Leasing.

10.2.3 Concession Contracting

Approved standard contract language will be used in all National Park Service concession contracts.

10.2.3.1 Terms and Conditions of Contracts
Concession services will be authorized under concession contracts, unless otherwise authorized by law. The term of a concession contract will generally be 10 years or less. However, the Director may award a contract for a term of up to 20 years if the Director determines that the contract terms and conditions, including the required construction of capital improvements, warrant a longer term. In this regard, the term of concession contracts should be as short as is prudent, taking into account the financial requirements of the concession contract, resource protection, visitor needs, and other factors that the Director may deem appropriate.

10.2.3.2 Modifications
Concession contracts may be modified only by written amendment. Amendments developed after the issuance of a concession contract must be consistent with current National Park Service policies and orders. Unless otherwise authorized by the contract, a concession contract may be amended to provide additional visitor services only if the services are minor and comprise a reasonable extension of the existing services.

10.2.3.3 Extension
Concession contracts may be extended only in accordance with the requirements of 36 CFR Part 51, subpart D. The signature authority for contract extensions or amendments must be consistent with delegations of authority from the Director.

10.2.3.4 Competition
In order to obtain the best service provider and maximize benefits to the government, the National Park Service encourages competition in the awarding of concession contracts. The National Park Service also encourages, through

outreach, the participation of American Indian, minority and women owned businesses when new business activities occur.

10.2.3.5 Third-party Agreements and Sub-concessions
Unless specified in the contract, sub- concession or other thirdparty agreements, including management agreements, for the provision of visitor services that are required and/ or authorized under concession contracts are not permitted. The NPS may also advertise for a new concession contract to provide these additional services.

10.2.3.6 Multi- park Contracts
Concessioners operating in more than one park unit must have separate contracts for each park unit. An exception may be made in the case of those park units having common National Park Service management or where service is provided in contiguous park areas (for example, a pack trip that crosses the boundary of two adjoining parks).

10.2.3.7 Termination
The Service may terminate concession contracts for default and under any other circumstances specified in the concession contract.

* * *

APPENDIX F

---

65 Fed. Reg. 20,630

RULES AND REGULATIONS

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

RIN 1024-AC72

Concession Contracts

Monday, April 17, 2000

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule amends 36 CFR Part 51, the National Park Service (NPS) regulations concerning NPS concession contracts, to comply with the requirements of Title IV of the National Parks Omnibus Management Act of 1998 (the 1998 Act). The 1998 Act provides new legislative authorities, policies and procedures for the solicitation, award and administration of concession contracts by NPS. This rule was published as proposed for public comment in the Federal Register as a matter of policy on June 30, 1999. NPS provided a 60-day public comment period on the proposed rule. This was extended by 45 days upon public request. NPS has fully considered all public comments received and considers this final rule to be lawful, consistent with the policies of Congress as expressed in the 1998 Act, and as accommodating to the concerns of commenters as possible in light of the legal and administrative responsibilities of NPS under the 1998 Act and other applicable authorities.

EFFECTIVE DATE: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Wendelin Mann, Concession Program, National Park Service, 1849 C Street, NW, Washington, DC 20240 (202/565-1219).

SUPPLEMENTARY INFORMATION: The 1998 Act has established a new statutory framework for the solicitation, award and administration of NPS concession contracts. Concession contracts are the form of governmental authorization used to permit persons (concessioners) to provide accommodations, facilities, and services to visitors to areas of the national park system. These services include, for example, lodging, food, merchandising, transportation, outfitting and guiding, and similar activities.

NPS has been awarding and administering concession contracts for this purpose in various forms since 1916 under the terms of 16 USC 1 *et seq*., the NPS "Organic Act." In 1965, Congress formally established by the Concession Policies Act of 1965, 16 USC 20 *et seq*. (the 1965 Act), a number of policies and procedures regarding concession contracts. NPS regulations contained in 36 CFR Part 51 implemented the 1965 law. On November 13, 1998, the Congress substantially revised these policies and procedures by passage of the 1998 Act. Many of the policies and procedures adopted by NPS in 36 CFR Part 51, as amended, and standard NPS concession contracts developed under the 1965 Act are reflected in the terms of the 1998 Act.

The Congress had two primary objectives in revising the 1965 Act: making the NPS concession management program more efficient and enhancing competition in NPS concession contracting.

The first objective is reflected in provisions of the 1998 Act that call, among other matters, for contracting to private businesses certain aspects of NPS concessions management and the establishment of an NPS Concessions Management Advisory Board to advise NPS on the conduct of its concessions management program. These provisions, although very

important, will be implemented administratively by NPS rather than through program regulations.

The second objective, enhancement of competition in NPS concession contracting, is reflected in the 1998 Act in a number of ways. Primarily, however, the 1998 Act achieves greater competition in two ways.

First, to achieve greater competition, the 1998 Act repealed, except for smaller and outfitter and guide concession contracts, the "preference in renewal" provision of the 1965 Act. The 1965 Act's preference in renewal provision required NPS to give existing satisfactory concessioners a preference in the renewal of their concession contracts, if the contract was to be continued after its expiration. This preference required NPS to permit existing satisfactory concessioners to meet the better terms and conditions of the best competing proposal for the renewal of its concession contract. Because of this preference, NPS estimated in 1993 that since 1965 over 99.9% of the renewals of NPS concession contracts had been awarded to the existing concessioner. In fact, from 1965 to 1993, only seven NPS concession contracts out of approximately 1900 awarded were not awarded to the incumbent concessioner (where the incumbent sought the contract). True competition simply did not exist.

The legislative history of the 1998 Act states as follows in connection with the repeal of the preference in renewal:

Under the 1965 Act, all satisfactory concessioners are entitled to preference in renewal of their concession contracts or permits. However, in light of the current circumstances of units of the National Park System and in recognition of present business conditions, the Committee considers that generally there is now no need to continue to provide a preferential right of renewal to concessioners in order to obtain qualified operators. Accordingly, to foster appropriate competition in the award of National Park Service concession contracts, the preferential right of renewal provided as a

statutory right to existing satisfactory concessioners is repealed by the S. 1693 [the bill that became the 1998 Act]. S. Rep. No. 105-202, at p.31 (1998).

The 1998 Act's other primary means to enhance competition in concession contracting was its reform of the 1965 Act's "possessory interest" concept. Under the 1965 Act, a concessioner that constructed real property improvements on park area lands under the terms of a concession contract obtained a compensable interest in the improvements in the form of a "possessory interest." The value of the possessory interest as of the date of the expiration or other termination of the concession contract was the "sound value" of the improvements to which the possessory interest related, but, not to exceed the "fair market value of the improvements," unless NPS and the concessioner agreed to an alternative value.

The Congress in considering S. 1693 noted that possessory interest under the 1965 Act was frequently criticized as "anti-competitive" because "the value of an existing concessioner's possessory interest was difficult to establish, thereby discouraging submittal of competitive offers for renewal of concession contracts." S. Rep. No. 105-202, at p. 35 (1998).

The 1998 Act reformed the possessory interest provisions of the 1965 Act through the leasehold surrender interest concept. Instead of obtaining a possessory interest in real property improvements as provided by the 1965 Act, the 1998 Act provides a "leasehold surrender interest" in "capital improvements" a concessioner constructs on park area lands "under the terms of a concession contract." The legislative history states as follows about the purposes of leasehold surrender interest:

The Committee considers that the leasehold surrender interest described by this section will provide concessioners with adequate security for investments in capital improvements they make. This will assist in encouraging such investment in visitor facilities in the National Park System. However,

the value of a leasehold surrender interest, i.e., the original construction cost, less depreciation as evidenced by physical condition and prospective serviceability, plus what amounts to interest on the investment based on the Consumer Price Index, should accurately reflect the real value of the improvements and should not result in undue compensation to a concessioner upon expiration of a concession contract. Additionally, the value of the leasehold surrender interest will be relatively easy to estimate so that a prospective new concessioner and the Secretary [of the Interior] can accurately calculate the amount for purposes of competitive solicitation of concession contracts. *Id.*

This final rule has three major purposes. The first is to set forth procedures as to how concession contracts are to be solicited and awarded by NPS under the 1998 Act. With certain exceptions, the 1998 Act requires competitive award of concession contracts. In some circumstances, an existing satisfactory concessioner may have a right to match the terms of a better competing proposal for a new concession contract. In fact, although the preference in renewal was the most mentioned issue in the comments received, more than 75% of the some 630 current NPS concessioners will continue to benefit from a preference in the renewal of their concession contracts. This is because the 1998 Act extends a preference in renewal to concessioners with contracts that have gross receipts of less than $500,000 or are outfitter and guide concessioners (more than 75% of the total).

Second, unlike the existing 36 CFR Part 51, the final rule sets forth in detail the nature of the compensatory interest in capital improvements a concessioner may construct on park lands under the terms of a concession contract. This leasehold surrender interest is defined in general terms in the 1998 Act. This rule establishes appropriate specific terms and conditions for leasehold surrender interests under the authority of the 1998 Act. Clarity as to the scope of leasehold surrender interest is important to both NPS and concessioners. Accord-

ingly, the leasehold surrender interest subpart of this rule is lengthy. However, concession contracts will be proportionately shorter as for the most part they will refer to this rule with respect to leasehold surrender interest terms and conditions.

Finally, the rule describes a number of provisions that concession contracts will contain in implementation of the 1998 Act.

The final rule reflects NPS's interpretation of the various provisions of the 1998 Act to appropriately administer the Act's requirements and purposes that are suitable for regulatory implementation. Section 417 of the 1998 Act requires NPS to promulgate regulations "appropriate for its implementation."

A. Response to Public Comments

* * *

"Concession Contract (or Contract)"

The general concessioner organization requested clarification of this definition with respect to when a concession contract can be something other than a written agreement. NPS has deleted the phrase "unless otherwise indicated in this part" in response to this comment.

The general concessioner organization also asked NPS to clarify its position regarding circumstances where an existing concessioner may continue to operate after the expiration of a concession contract. Particularly, the comment requested NPS to make clear that (i) an incumbent concessioner is not required to continue to operate after the expiration of its contract; (ii) that if the concessioner does not choose to continue to operate, NPS must honor the obligations of the expired contract; (iii) that if the concessioner does continue to operate the continuation is to be on the same terms and conditions as the expired contract unless otherwise agreed by the parties; and (iv) the concessioner, if it continues to operate, "shall not be placed in any worse economic position upon the commencement of the new contract than the concessioner would have been had the new contract commenced upon the original expiration date of the prior contract."

NPS considers that the first three statements must be examined in the context of particular contracts and need no amplification in the regulations. The last point seems to suggest that a concessioner that continues to operate after the expiration or other termination of a concession contract may be harmed economically by this action. However, as a concessioner is not obliged to continue operations upon the expiration or other termination of a concession contract (unless the terms of a concession contract otherwise provide), a concessioner's decision to continue operations would seem to obviate any concerns about possible "economic harm" resulting from the continued operations. In any event, NPS does not consider that changes to the definition of "concession contract (or contract)" are warranted on the basis of these comments. (NPS points out that it uses the phrase "expiration or other termination" of a concession contract in this paragraph as the 1965 Act utilizes this terminology. Under the 1965 Act, the "expiration" of a concession contract is considered a form of contract termination.)

Several comments also objected to the statement in this definition that concession contracts are not contracts within the meaning of 41 USC 601 *et seq*. (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations, or policies that apply only to federal service contracts or other types of federal procurement actions.

NPS has fully considered these views and disagrees with their conclusions. The Contract Disputes Act, by its terms, applies to procurement contracts. A procurement contract is a contract under which the government bargains for, pays for,

and receives goods or services. *YRT Services Corporation* v. *United States*, 28 Fed. Cl. 366, 392, n.23 (1993).

The court in *YRT Services* concluded that an NPS concession contract for lodging facilities "did not constitute a procurement" as NPS is not paying for the [concessioner's] services but is "collecting fees in exchange for granting a permit to operate a concession business." *Id.*

Several comments on this issue discussed a series of Interior Department Board of Contract Appeals (IBCA) decisions that held that NPS concession contracts are subject to the Contract Disputes Act as procurement contracts. However, several General Accounting Office decisions take a contrary view. NPS has reviewed the IBCA decisions and notes that all but one preceded the decision of the Court of Claims in *YRT Services*, and all concern 1965 Act concession contracts, not 1998 Act concession contracts. (This final rule, issued under the terms of the 1998 Act, supercedes these IBCA decisions.)

NPS points out that the 1998 Act, unlike the 1965 Act, contains an express statement as to the purposes of NPS concession contracts:

In furtherance of the findings and policy stated in Section 402, and except as provided by this title or otherwise authorized by law, the Secretary shall utilize concession contracts to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to units of the national park system. (Section 403 of the 1998 Act. Emphasis added.)

This statutory provision tracks the reasoning in *YRT Services* as to why 1965 Act concession contracts are not procurement contracts. The purpose of concession contracts is not to procure goods or services for the government. Furthermore, NPS notes that the existing 36 CFR Part 51, the NPS regulations that implemented the 1965 Act, expressly state that concession contracts "are not Federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to Federal procurement actions." (36 CFR 51.1.) The Congress, in passing the 1998 Act, must be presumed to have been aware of this regulatory interpretation and the decision of the court in *YRT Services*. In fact, it appears that the inclusion of the sentence in Section 403 of the 1998 Act to the effect that concession contracts are contracts that "authorize a person to provide accommodations, facilities and services" to park area visitors is a direct confirmation of the position of the court in *YRT Services* and the NPS interpretation of the 1965 Act contained in the existing 36 CFR Part 51.1. NPS concession contracts do not procure services for the government; rather, they authorize third parties to provide services to park area visitors.

The NPS Organic Act, 16 USC 1 *et seq.*, also expressly recognizes this distinction. 16 USC 17b provides that the Secretary of the Interior is authorized to contract with persons that provide services or other accommodations to the public in national parks to furnish such services or accommodations to the Government without compliance with the 41 USC 5. 41 USC 5 is the title of the United States Code that establishes procurement contract requirements. Accordingly 16 USC 17b makes clear that if the government contracts with a concessioner to provide services and accommodations to the Government (that the concessioner is authorized to provide to the public), the contract is a procurement of services to the government otherwise subject to 41 USC 5. In addition, by implication, this authority also makes clear that a concessioner's authorization to provide goods and services to park visitors is not a procurement contract as the goods and services are not provided to the Government.

NPS, in reviewing this issue, did consider the fact that concession contracts in one sense could be argued to result in "services" to the government, i.e., that concession contracts may require the concessioner to repair and maintain govern-

ment property assigned to a concessioner under the terms of a concession contract. However, these services (repair and maintenance of government property) flow from the assignment (the equivalent of a lease of government property) of property to a concessioner for use in concession operations.

In this connection, the 1998 Act expressly exempts NPS concession contracts from the application of Section 321 of the Act of June 30, 1932 (40 USC 303b), "relating to the leasing of buildings and properties of the United States," thereby permitting NPS to accept the repair, maintenance and improvement of government property from a concessioner instead of collecting cash rent for the use of the property. The legislative history of the 1965 Act (and a related 1962 law) indicates that this provision was included in the 1965 Act (and a related 1962 law) in response to a Comptroller General Opinion that concession contracts are leases. Accordingly, to the extent that the repair and maintenance of assigned property may be considered as "services" to the government, these services are recognized by the 1998 Act as an authorized function of the assignment of government property under concession contracts, not as a procurement of services for the government.

For these reasons, NPS does not consider that NPS concession contracts are subject to the Contract Disputes Act or to other statutes that apply only to federal procurement contracts. Accordingly, it has left this statement in the final rule. NPS also points out that it does not consider the solicitation of NPS concession contracts to be subject to the Competition in Contracting Act ("CICA") as it applies to procurement contracts. *YRT Services* at p. 392. In any event, even if it were determined that NPS concession contracts are subject to CICA, the express provisions of the 1998 Act describing mandatory NPS concession contracting procedures make CICA inapplicable to NPS concession contract under its own terms. 41 USC 253(a)(1)(1988).

A comment asked whether the term "concession contract" refers to "concession permits" awarded under the 1965 Act. It does, as indicated in the definition of "concession contract."

A sentence has been added to this definition in the final rule to clarify that concession contracts must include terms and conditions as are required by law, this part, or are otherwise appropriate in furtherance of the purposes of this part and the 1998 Act.

* * *

APPENDIX G

---

65 Fed. Reg. 44,894

NOTICES

DEPARTMENT OF THE INTERIOR

National Park Service

Simplified Concession Contracts; Revision

Wednesday, July 19, 2000

ACTION: Final revision of the National Park Service simplified concession contracts.

SUMMARY: The National Park Service (NPS) authorizes certain business entities to operate concessions in areas of the national park system. The agreements embodying these authorizations are concession contracts (and, previously, concession permits) that incorporate NPS terms and conditions established by law and prudent contract administration. In 1998, Public Law 105-391 (the 1998 Act) was enacted and which in many significant ways affects the content of concession contracts to be entered into after its effective date. NPS has amended its existing standard concession contract (Category I contract) to conform to the requirements of the 1998 Act and to otherwise make improvements to the standard form (65 FR 26052, May 4, 2000).

Under this notice, NPS adopts two simplified versions of its standard concession contract (Category II and Category III contracts) that will be used for smaller concession operations. Although not required to do so by law, NPS sought by publication in the Federal Register on December 21, 1999, public comments on the proposed simplified contracts to assist it in developing final versions as a matter of public comment. NPS, after consideration of public comments has adopted these simplified versions of its standard concession contract.

NPS points out that these simplified versions of the standard concession contract serve as a guideline for the form of concession contracts used to authorize smaller concession operations. These forms reflect the current policies of NPS with regard to concession operations, but may be changed by the Director of NPS when necessary to accommodate the circumstances of any particular contracting situation, so long as the contract form used is consistent with the 1998 Act and 36 CFR Part 51.

EFFECTIVE DATE: August 18, 2000.

FOR FURTHER INFORMATION CONTACT: Cindy Orlando, Concessions Program Manager, National Park Service, 1849 "C" Street, NW, Washington, DC 10140 (202/565- 1210).

SUPPLEMENTARY INFORMATION: The 1998 Act, among other matters, amended the statutory policies and procedures under which NPS operated its concession program. The new law required adoption of new regulations governing the award, content and management of concession contracts. On June 30, 1999, NPS published for public comment proposed regulations implementing the new law. The final new regulations were published in the Federal Register on April 17, 2000. On September 3, 1999, NPS published for public comment a new standard concession contract (Category I contract). The final Category I contract language was published in the Federal Register on May 4, 2000. On December 21, NPS published for public comment its proposed simplified concession contracts (Category II and Category III contracts) that will be used for smaller concession operations that do not involve the concessioner's obtaining a compensable interest in real property located on park lands. The simplified concession contracts set forth in this notice reflect the requirements of the 1998 Act and the requirements of the amended 36 CFR Part 51. They also reflect a variety of improvements NPS wishes to make to its standard form con-

tracts, including a new organizational structure for the sake of clarity.

NPS will utilize the three contract categories as follows:

Category I contracts will be used in situations where the concessioner will be required or allowed to construct or install capital improvements on park area lands, thereby acquiring in certain conditions a leasehold surrender interest. Category I contracts will also require that the concessioner perform capital maintenance on assigned concession facilities, as necessary, and may require the establishment of a maintenance reserve for this purpose.

Category II contracts will be used in situations where a concessioner will operate on assigned land or in an assigned concession facility, but will not be allowed to construct or install capital improvements. As an example, a Category II contract might be used to authorize a gift shop operation in a portion of a park visitor center, or a small snack bar operation in an assigned building.

Category III contracts will be used in situations where no lands or buildings are assigned to the concessioner; consequently, the concessioner will not be allowed to construct or install any capital improvements and the concessioner will not obtain any leasehold surrender interest. Many outfitter/guide operations will be authorized by Category III contracts.

Public Comments

Twenty-two public comments were received in response to the public notice. Twenty of these comments were from outfitters and guides, or groups representing outfitters and guides. The remaining two comments were submitted by an organization representing some 150 existing concessioner members (the "general concessioner organization"), and by one large concessioner supporting the comments made by that organization.

Two commenters expressly incorporated by reference objections they had made to the proposed Category I contract. Those comments are not addressed here, as they have been addressed in the preamble to the Category I contract. Additionally, several comments directed to specific provisions of the Category II and Category III contracts have been addressed in response to similar comments received on the Category I contract. These comments will be noted here, and the response will give reference to the section of the Category I preamble where they have been addressed. Changes made to the Category I contract in response to public comments are incorporated in the final simplified contracts where applicable.

General Comments

All but one commenter stated that the simplified contracts must specifically recognize the right of preference provided to outfitters and guides and small businesses under the 1998 Act. See NPS response in paragraph 7, Additional Provisions Section of the Category I contract.

One commenter who submitted comments on behalf of Alaska hunting guides identified several sections where conflicts may exist between the contracts and the provisions of the Alaska National Interest Lands Conservation Act (ANILCA) or other laws specific to Alaska. NPS wishes to point out that the proposed simplified contracts have been developed for nationwide application. If, in the development of individual contracts, it appears that modifications are necessary in order to comport with specific legislative requirements, they will be considered and incorporated, as appropriate, on a case-by-case basis. The NPS further notes that the 1998 Act specifically states that the Act does not amend, supersede or otherwise affect any provision of ANILCA relating to revenue producing visitor services (Sec. 415(c) of the 1998 Act).

Only one of the 22 commenters objected to the length and level of detail of the proposed simplified contracts. NPS has made every effort to streamline the simplified contracts to the extent possible. However, it considers that all of the provisions are required in order to give NPS the ability to properly preserve and protect the resources of areas of the national park system and their visitors. Further, the simplified contracts provide added protections to small concessioners that were not afforded under the terms of concession permits with regard to NPS administrative actions.

In developing these final simplified contracts, NPS has incorporated the changes it has made to the Category I contract in response to public comment, to the extent applicable. Those changes, and the discussion of those changes, are incorporated and made a part of this notice, as if repeated fully herein. In addition, discussions of comments and/or changes made in response to public comments on 36 CFR part 51 as amended, to the extent that they are applicable to the simplified contracts, are also incorporated and made a part of this notice. NPS has also made several editorial and conforming changes to the simplified contracts in addition to the changes discussed below.

* * *

Supreme Court, U.S.
FILED
DEC 27 2002
OFFICE OF THE CLERK

(5)

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

48pp

QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, applies to contracts between the National Park Service and private parties that provide concession services, including the development, operation, and maintenance of facilities such as restaurants, lodges, and gift shops, in the national parks.

RULES 24.1(b) AND 29.6 STATEMENT

In addition to the National Park Hospitality Association, plaintiffs/appellants in the court of appeals (in four consolidated cases) were Amfac Resorts L.L.C. (since renamed Xanterra Parks & Resorts L.L.C.), ARAMARK Sports and Entertainment Services, Inc., and Hamilton Stores, Inc. In addition to the United States Department of the Interior, respondents are Gale Norton, Secretary of the Interior, Fran P. Mainella, Director of the National Park Service, and Delaware North Park Services, Inc. (which intervened as a defendant in this and one of the consolidated cases).

The National Park Hospitality Association ("NPHA") is a non-profit trade association that has no parent corporations or stock. The NPHA represents concessioners who operate concessions, such as restaurants, lodges, recreational services, and gift shops, in the national parks.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

RULES 24.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

THE CONTRACT DISPUTES ACT APPLIES TO NATIONAL PARK SERVICE CONCESSIONS CONTRACTS 10

A. The CDA Applies By Its Plain Terms To Virtually All Government Contracts For The Procurement Of Goods Or Services. 10

1. The CDA's plain language. 11

2. The CDA's structure. 13

3. The CDA's background 16

B. NPS Concessions Contracts Fall Squarely Within The Scope Of The CDA. 19

C. The Reasons Offered By The NPS For Exempting Concessions Contracts From The CDA Are Insubstantial. 26

TABLE OF CONTENTS – continued

Page

1. Monetary payments are irrelevant to CDA applicability. 27
2. A government procurement does not fall outside the scope of the CDA merely because it may be said to benefit the public as well as the government. 29
3. NPS concessions contracts would be subject to the CDA even if the statute applied only to contracts that procure benefits for the government. 33

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES

Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 14

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 11

Bartlett & Co. Grain, AGBCA No. 86-187-1, 91-1 BCA ¶ 23,415, 1990 WL 166521 (Oct. 18, 1990) 28

Bonneville Associates v. *United States*, 43 F.3d 649 (Fed. Cir. 1994) 28

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 7, 8, 11

Coffey v. *United States*, 626 F. Supp. 1246 (D. Kan, 1986) 28

D.L. Kaufman, Inc., PSBCA Nos. 4159 *et al.*, 00-1 BCA ¶ 30,846, 2000 WL 348319 (Mar. 10, 2000) 31

Erwin v. *United States*, 19 Cl. Ct. 47 (1989) 14

Ferens v. *John Deere Co.*, 494 U.S. 516 (1990) 32

Franchise Tax Board v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) 29

Grunley Constr. Co., ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998) 36

Harris v. *United States*, 122 S. Ct. 2406 (2002) 13

Harry Pohl KG, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 WL 238730 (Feb. 28, 2001) 25, 29

Hernandez, ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742 (Dec. 12, 2000) 26

TABLE OF AUTHORITIES – continued

Page(s)

Home Entm't, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 WL 669405 (Aug. 23, 1999) 25

Int'l Hair, ASBCA No. 50948, 01-1 BCA ¶ 31,393, 2001 WL 520821 (Apr. 25, 2001)..... 25, 29

J.E.M. AG Supply, Inc. v. *Pioneer Hi-Bred International, Inc.*, 122 S. Ct. 593 (2001)..... 10

J & J Maintenance, Inc., ASBCA No. 50,984, 00-1 BCA ¶ 30,784, 2000 WL 199758 (Feb. 15, 2000)..... 36

Libra Eng'g Inc., NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984) 36

National Park Concessions, Inc., IBCA No. 2995, 94-3 B.C.A. ¶ 1994 WL 462401 (Aug. 18, 1994) 24

National R.R. Passenger Corp. v. *Boston & Maine Corp.*, 503 U.S. 407 (1992)..... 13

Niko Contracting Co. v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table)..... 36

Oliver Eng'g Servs., DOTCAB Nos. 2549, 2550, 94-2 BCA ¶ 26,920, 1994 WL 179768 (May 09, 1994)..... 31

Oroville-Tonasket Irrigation Dist. v. *United States*, 33 Fed. Cl. 14 (1995) 4

OSHCO-PAE-SOMC v. *United States*, 16 Cl. Ct. 614 (1989) 13, 14

Outlaw Group, Inc., ASBCA No. 46,132, 96-1 BCA ¶ 27,949, 1995 WL 563830 (Sept. 13, 1996) 25

TABLE OF AUTHORITIES – continued

Page(s)

Paragon Energy Corp. v. *United States*, 645 F.2d 966 (Ct. Cl. 1981)..... 18

Pound v. *United States*, No. 94-496C, slip op (Fed. Cl. Aug. 30, 1996) 26

Propellex Corp., ASBCA No. 50,203, 02-1 BCA ¶ 31,721, 2001 WL 1678757 (Dec. 27, 2001)..... 31

Renaissance Investments, Inc., ENGBCA No. 5704, 98-1 BCA ¶ 29,712, 1998 WL 199079 (Apr. 17, 1998)..... 26

Rice King, ASBCA No. 43,352 92-2, BCA ¶ 24,805, 1992 WL 34026 (Feb. 20, 1992)..... 26

R & R Enterprises, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989)..... 24

Senor Tenedor, S.A. de C.V., ASBCA Nos. 48502, 49272, 97-2 BCA ¶ 29,192, 1997 WL 484580 (Aug. 15, 1997) 26

Starfleet Marine Transp., Inc., B-290,181, 2002 CPD ¶ 113, 2002 WL 1461877 (July 5, 2002)..... 36

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 30

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001)..... 14

United States v. *Johnson*, 529 U.S. 53 (2000) 14

Watch Hill Concessions Inc., IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911 (Feb. 16, 2001)..... 18, 19, 24

Whitey's Welding & Fabrication, Inc. v. *United States*, 5 Cl. Ct. 284 (1984)..... 15

TABLE OF AUTHORITIES – continued

Page(s)

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 25, 31, 32

STATUTES, RULES AND REGULATIONS

5 U.S.C. § 706 6

The Long-Term Care Security Act of 2000 ("Long-Term Care Act"), Pub. L. No. 106-265, 114 Stat. 762 (codified at 5 U.S.C. §§ 9001-9009) 30

5 U.S.C. § 9003 ..... 30, 31

5 U.S.C. § 9004 31

16 U.S.C. § 1 ..... 4, 7, 33

National Park Service Concessions Policy Act of 1965, Pub. L. No. 89-249, 79 Stat. 969 (1965) 2, 5

16 U.S.C. § 20d 5

National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966) 5

16 U.S.C. § 5951 ..... 6, 7, 8, 33

16 U.S.C. § 5952 ..... 6, 8, 23, 33

16 U.S.C. § 5954 23

16 U.S.C. § 5962 6

28 U.S.C. § 1254 1

28 U.S.C. § 1346 1

28 U.S.C. § 1491 ..... 1, 6

31 U.S.C. § 3551 35

TABLE OF AUTHORITIES – continued

Page(s)

40 U.S.C. § 303b 6

41 U.S.C. § 404 11

The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613) ..... *passim*

41 U.S.C. § 601 14

41 U.S.C. § 602(a) ..... *passim*

41 U.S.C. § 602(b) 15

41 U.S.C. § 602(c) 14

41 U.S.C. § 603 15

41 U.S.C. § 605 3

41 U.S.C. § 606 3

41 U.S.C. § 607 ..... 3, 8

41 U.S.C. § 608 8

41 U.S.C. § 609 ..... 3, 4, 13, 18

41 U.S.C. § 611 4

An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916) 4

Pub. L. No. 91-129, 83 Stat. 269 (Nov. 26, 1969) 17

36 C.F.R. § 51.3 ..... 2, 6, 7, 26, 37

48 C.F.R. § 1.104 27

48 C.F.R. § 2.101 27

Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (codified at 36 C.F.R. pt. 51) 5, 6, 26

TABLE OF AUTHORITIES – continued

Page(s)

Standard Concession Contract, 65 Fed. Reg. 26,052 (May 4, 2000) 6, 20, 23, 35

MISCELLANEOUS

124 Cong. Rec. H10,729 (daily ed. Sept. 26, 1978)..... 15

124 Cong. Reg. S18,640-S18,641 (daily ed. Oct. 12, 1978)..... 15

BRYAN A. GARNER, BLACK'S LAW DICTIONARY (7th ed. 1999)..... 12, 13

C. Kipps, T. Kindness & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L.J. 585 (1999) 17

H.R. REP. NO. 106-610(1)..... 30

H.R. REP. NO. 95-1556..... 3

S. Jacoby, *The Contract Disputes Act of 1978: An Important Development*, 39 Fed. B.J 10 (1980) 17

ROBERT T. PEACOCK & PETER D. TING, CONTRACT DISPUTES ACT ANNOTATED (1998) 15

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) 17, 18, 19

S. REP. NO. 89-765, 1965 U.S.C.C.A.N. 3489..... 5

S. REP. NO. 95-1118, 1978 U.S.C.C.A.N. 5235..... *passim*

L. Spector, *The Contract Disputes Act of 1978 – Some Observations and Predictions*, 39 FED. B.J. 1 (1980) 17

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1961)..... 12

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 282 F.3d 818. The Memorandum Opinion of the district court addressing the issue before this Court (Pet. App. 35a-92a) is reported at 142 F. Supp. 2d 54. Other opinions of the district court on unrelated issues are reported at 143 F. Supp. 2d 7 and 150 F. Supp. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002, and a timely petition for rehearing was denied on May 8, 2002 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on August 6, 2002, and was granted on November 12, 2002 (J.A. 28). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a), provides:

> (a) Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28, United States Code) entered into by an executive agency for –
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

36 C.F.R. § 51.3 provides in relevant part:

> *A concession contract (or contract)* means a binding written agreement between the Director [of the National Park Service] and a concessioner entered under the authority of [36 C.F.R. pt. 51] or the [National Park Service Concessions Policies Act of 1965, Pub. L. No. 89-249] that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. *Concession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contract Disputes Act)* and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

(second emphasis added).

STATEMENT

This case concerns the applicability of the Contract Disputes Act of 1978 ("CDA") to concessions contracts, and in particular to contracts between the National Park Service ("NPS") and the private concessioners who contract to provide visitor services and to operate and maintain facilities in the national parks. The language of the CDA broadly covers all contracts entered into by a federal agency for the procurement of personal property, services, or the repair and maintenance of real property. Despite the CDA's breadth, the NPS has asserted by regulation that the statute does not apply to its concessions contracts. In upholding that regulation, the District of Columbia Circuit ignored the text of the CDA and disagreed with the views of the Department of the Interior's own Board of Contract Appeals.

As Congress recognized when it passed the CDA, "[h]ow [government] procurement functions has a far-reaching impact on the economy of our society and on the success of

many major Government programs." S. REP. NO. 95-1118, at 4, reprinted in 1978 U.S.C.C.A.N. 5235, 5238. The D.C. Circuit's decision is based on a cramped interpretation of the CDA that undermines this important federal statute.

1. The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613, on its face applies to *all* government contracts for "the procurement of property, other than real property in being," "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(1)-(3). The statute was designed to replace a system of dispute resolution procedures based on "[t]he predilections of different agencies" (S. REP. NO. 95-1118, at 3) that was "often too expensive and time consuming for the efficient and cost-effective resolution of small claims and, on the other hand, often fail[ed] to provide the procedural safeguards and other elements of due process that should be the rights of litigants" (*id.* at 4). Thus, the CDA has "broad application in order to unify the diverse and often inconsistent procedures [previously] existing among the many procuring agencies." *Id.* at 17.

The CDA "provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." *Id.* at 1; see also H.R. REP. NO. 95-1556, at 5. Under the CDA, parties contracting with the government have a number of important procedural and substantive rights. The CDA establishes that all claims "relating to" a contract covered by the CDA are subject to the Act's administrative dispute processes. See 41 U.S.C. § 605(a). Most importantly, those processes provide due process protection to contractors by mandating that neutral arbiters review final decisions reached by the agency's contracting officer. In particular, the contractor has the choice to appeal the contracting officer's decision either to the agency's "Board of Contract Appeals" (see 41 U.S.C. §§ 606, 607)) or to the Court of Federal Claims (see 41

U.S.C. § 609(a)(1)), both of which are statutorily required to review the decision "de novo" (41 U.S.C. § 609(a)(3)). Substantively, a major advantage of the CDA over the hodgepodge of dispute-resolution schemes it replaced is that contractors are entitled to interest on any amount found due to them on their claims. See 41 U.S.C. § 611; *Oroville-Tonasket Irrigation Dist.* v. *United States*, 33 Fed. Cl. 14, 23 n.3 (1995).

2. When the NPS was created in 1916 it was charged with two basic mandates: "to oversee our national parks and to 'conserve the scenery and the natural and historic objects and the wild life therein and * * * provide for the enjoyment of the same.'" Pet. App. 49a (quoting 16 U.S.C. § 1 (omission in original)). In the Act creating the NPS, "Congress authorized the Interior Secretary to 'grant privileges, leases, and permits for the use of land for the accommodation of visitors' to each of the 'various parks, monuments, or other reservations' under the Secretary's authority." Pet. App. 2a (quoting An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916) ("NPS Organic Act")).

"[P]rovid[ing] for the enjoyment" of the national parks (16 U.S.C. § 1) generally requires that visitors be offered various services throughout the parks. Usually, these services are delivered in park commercial facilities, such as lodges, restaurants, and retail outlets, that are owned by the federal government. Because the government has been unable or unwilling to develop the expertise or assume the huge financial burdens and other responsibilities associated with the provision of these visitor services, throughout its history the NPS has relied on private concessions contractors to build, maintain, and operate its visitor-service facilities and to provide many of the other services that the public typically associates with a national park, such as outfitter and guide services. See Pet. App. 49a (NPS has always "relied on private concessioners for the provision of 'lodging, food, merchandising, transportation, outfitting and guiding, and similar

activities.'") (quoting Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000)). The national parks concessions program, therefore, has always been a partnership between the NPS and concessions contractors to develop and provide access to the national parks for the enjoyment of the public. In this way, the NPS can concentrate on its other mandate under the NPS Organic Act – the conservation of park natural and historic assets.

Between 1916 and 1965, although Congress had authorized concessions contracting by the NPS, there was no specific statutory scheme governing the relationship between the agency and concessioners. In light of growing industry and governmental concern about the NPS's concessions-contracting policies (see Pet. App. 3a-4a), Congress enacted the National Park Service Concessions Policy Act of 1965 ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965), to govern concessions contracts. The 1965 Act's primary purpose was to codify preexisting NPS concession policy in order to assure concessioners that their investments and contract rights enjoyed legal protection. See S. REP. NO. 89-765, reprinted in 1965 U.S.C.C.A.N. 3489, 3489 (principal purpose of the 1965 Act was "to put into statutory form policies which * * * have heretofore been followed by the [NPS] in administering concessions"). Among other things, the 1965 Act afforded concessioners a preferential right of renewal for their concessions contracts (16 U.S.C. § 20d) and authorized the NPS to grant other specified contractual inducements for making investments in the national parks. See Pet. App. 4a, 50a-51a. In exchange, "[c]oncessioners paid the government a franchise fee * * * for the privilege of operating on federal land." *Id.* at 4a.

In 1998, Congress repealed the 1965 Act and passed a replacement statute, the National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966). The 1998 Act altered various technical aspects of the

system under which the NPS enters into private concessions contracts to provide visitor services in the national parks. Like the 1965 Act before it, the 1998 Act sought to further the mission of the national park system by protecting the parks for the future while ensuring that the agency continued to provide the appropriate "accommodations, facilities, and services" that are "necessary and appropriate for public use and enjoyment." See 16 U.S.C. § 5951(b)(1). In particular, the 1998 Act specified that the NPS "shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952. Although the 1998 Act expressly addressed the applicability of certain other statutes (see, *e.g.*, 16 U.S.C. § 5962 (40 U.S.C. § 303b does not apply to contracts under the 1998 Act)), it did not purport to exempt NPS concessions contracts from the scope of the CDA.

The NPS thereafter issued regulations implementing the 1998 Act (see Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (codified at 36 C.F.R. pt. 51)), as well as a model "Standard Concession Contract" (65 Fed. Reg. 26,052 (May 4, 2000)). These regulations declare that:

> Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq*. (the Contract Disputes Act) * * *.

36 C.F.R. § 51.3.

3. In November and December 2000, the National Park Hospitality Association ("NPHA"), a non-profit trade association that represents many concessioners who do business in the national parks, and three individual concessioners filed separate actions challenging aspects of the NPS regulations and Standard Concession Contract. Among other claims, the NPHA and the individual plaintiffs (collectively, "NPHA") challenged 36 C.F.R. § 51.3 as being contrary to the CDA. See 5 U.S.C. § 706(2); 28 U.S.C. § 1491(b)(4). The NPHA

alleged that the regulation improperly excluded NPS concessions contracts from the CDA, despite (1) the CDA's plain language, legislative purpose, and legislative history; (2) contrary decisions of the Federal Circuit and its predecessor (the Court of Claims); (3) contrary decisions of the Court of Federal Claims and the Department of Interior's Board of Contract Appeals ("IBCA"); (4) the position taken by the NPS in at least one prior reported decision on a concessions contract dispute; and (5) the obvious consequent ability, if the regulation were upheld, of virtually any agency to employ similar means to circumvent the CDA.

The cases were consolidated in the district court. On May 23, 2001, the court granted summary judgment in the NPS's favor in most respects, and in particular held that the CDA does not apply to concessions contracts. See Pet. App. 68a-72a. The court acknowledged that in an NPS concessions contract "the government is receiving services" and "is contracting for the provision of amenities to the visitors of its national parks" (*id.* at 68a), thus fulfilling its statutory obligation to accommodate visitors (see generally 16 U.S.C. §§ 1, 5951). The court also acknowledged that "because the concession contracts contain various terms relating to the stewardship of concession areas, * * * it can be said that the government is also bargaining for the maintenance of real property." Pet. App. 68a. Despite these conclusions, the court determined that the CDA is ambiguous as to whether it applies to concessions contracts. See *id.* at 68a-69a. The court then afforded *Chevron* deference to the NPS and concluded that 36 C.F.R. § 51.3 was a permissible interpretation of the CDA. See Pet. App. 70a.

The District of Columbia Circuit affirmed in relevant part. At the outset, the court of appeals held that the district court's rationale was erroneous: the NPS "does not administer the Contract Disputes Act, and thus may not have inter-

pretative authority over its provisions." Pet. App. 27a.[1] Accordingly, the court of appeals agreed with the NPHA that the NPS was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court upheld the agency's determination that the CDA does not apply to concessions contracts:

> The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C. § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

Id. at 29a. In the D.C. Circuit's view, concessions contracts do not fall within the CDA because their purpose is to benefit "park area visitors," rather than the government itself. *Id.* at 27a.

SUMMARY OF THE ARGUMENT

This case presents a straightforward question of statutory interpretation. The Contract Disputes Act by its terms applies to any contract for "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(2), (3). NPS concessions contracts fall comfortably within these provisions; they uniformly involve the procurement of services, and usually also involve the procurement of work related to government-owned facilities within the national parks. Thus, NPS concessions contracts are subject to the CDA, and the concessioners who agree to provide services within the national

[1] To the extent Congress granted limited authority to implement and interpret the CDA, it was to the Administrator of the Office of Federal Procurement Policy, not to the Secretary of the Interior. See 41 U.S.C. §§ 607(h), 608(f).

parks are entitled to the statute's substantive and procedural protections.

Rather than abide by the plain language of the CDA, the NPS has created a series of putative exceptions to the statute that, in the agency's view, exempt its concessions contracts from the Act. In particular, the agency claims that only contracts involving the expenditure of government funds are subject to the CDA. But there is no statutory basis for this exception. Furthermore, such an exception is inconsistent with the goals of the statute, which include unifying dispute-resolution mechanisms across diverse forms of government contracts and different government agencies and expanding government contractors' access to impartial fora for the resolution of disputes with the government. If this putative exception were to exist, agencies could easily manipulate their contracts to avoid the CDA.

The NPS's other major justification for exempting its concessions contracts from the CDA is equally fallacious. According to the agency, the CDA applies only to those contracts that directly benefit the government and does not extend to contracts for the procurement of goods or services that primarily "benefit * * * the public" (Br. in Opp. 11). But again, there is no statutory basis for this exception, which would wreak havoc with government procurement law. Coverage under the CDA would depend upon subjective determinations of who may be said to "benefit" from a government procurement. In any event, NPS concessions contracts *do* involve the procurement of services, and the construction, alteration, repair and maintenance of real property, that directly benefit the government. Thus, even if the agency's cramped reading of the CDA were correct, NPS concessions contracts would still fall within the statute's scope.

The CDA was designed to have "broad application in order to unify the diverse and often inconsistent procedures ex-

isting among the many procuring agencies" (S. REP. NO. 95-1118, at 17). Accordingly, the CDA applies to *all* government contracts for the procurement of goods or services "[u]nless otherwise specifically provided herein" (41 U.S.C. § 602(a)). The NPS was not at liberty to add limiting language to a statute that Congress plainly intended to be broad and comprehensive. See *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 598 (2001).

ARGUMENT

THE CONTRACT DISPUTES ACT APPLIES TO NATIONAL PARK SERVICE CONCESSIONS CONTRACTS

The text and history of the Contract Disputes Act make clear that Congress intended the statute to be comprehensive: the Act was designed to end the previous uncertainty about which dispute-resolution regime would govern any specific contract dispute by imposing uniform procedures on virtually every government contract. Thus, with only a few carefully delineated exceptions, the CDA covers all disputes between the government and those with whom it contracts for the procurement of goods, services, or the maintenance of real property. Only by ignoring the CDA's plain language, and inappropriately creating new exceptions to the statute, could the court of appeals find that NPS concessions contracts fall outside the statute's scope.

A. The CDA Applies By Its Plain Terms To Virtually All Government Contracts For The Procurement Of Goods Or Services.

In upholding the NPS's effort to exempt its concessions contracts from the CDA, neither the D.C. Circuit nor the district court seriously analyzed the language of the statute. Rather, like the agency (see Br. in Opp. 10-12), both courts instead stressed the several ways in which NPS concessions contracts differ from the majority of government procure-

ment contracts. But such differences are irrelevant to the plain meaning of the CDA. "[I]n [this and] all statutory construction cases, [courts must] begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations and internal quotation marks omitted). That is manifestly the case here.[2]

The beginning and the end of this case should therefore be the plain language of 41 U.S.C. § 602(a), which defines those contracts to which the CDA applies in a way that irrefutably encompasses NPS concessions contracts. But if the plain language were not enough, the breadth of the CDA is evident in the statute's structure and background, both of which further underscore that it must apply to NPS concessions contracts.

1. The CDA's plain language.

The CDA applies to "*any* express or implied contract" entered into by "an executive agency" for "the procurement of" (1) "property, other than real property in being," (2) "ser-

---

[2] Even if the CDA were ambiguous, the NPS's regulation exempting its concessions contracts from the statute would deserve no deference because the CDA is not "a statutory scheme [the NPS] is entrusted to administer." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); Pet. App. 27a. See note 1, *supra*. If each agency could independently interpret the CDA, it would frustrate a central purpose of the statute, which was to make government procurement policy *consistent* across agencies. See S. REP. NO. 95-1118, at 2, 17; pages 18-19, *infra*; see also 41 U.S.C. § 404(a) (Office of Federal Procurement Policy exists to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies").

vices," or (3) the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(1)-(3) (emphasis added)) – unless the CDA "specifically provide[s]" otherwise (*id.* § 602(a)).[3]

The NPS does not deny that concessions contracts are "contracts" and that it is an "executive agency," nor does it claim that the CDA itself specifically exempts these contracts from its coverage. Thus, the agency is left to assert (Br. in Opp. 9) that "[t]he CDA applies only to procurement contracts, and the NPS's concession contracts are not procurement contracts." But there are two significant problems with this textual argument.

To begin with, the CDA does not limit its scope to a category of contracts known as "procurement contracts." The word "procurement" appears in the CDA as a noun, rather than as an adjective describing and limiting the types of contracts entitled to the protections of the statute. Accordingly, the NPS ascribes far too much significance to the catch phrase "procurement contracts" in its construction of the statute. Moreover, "procurement" is a broad term; its common meaning is "[t]he act of getting or obtaining something." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1224 (7th ed. 1999).[4] In other words, Congress has dictated that the

---

[3] The statute also applies to contracts for "the *disposal* of personal property," (41 U.S.C. § 602(a)(4) (emphasis added)), which are merely the converse of contracts for the procurement of personal property.

[4] See also, *e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1974 (2d ed. 1961) ("procurement" means "[a]ct of procuring or obtaining; attainment; acquisition"; principal definition of "procure" is "[t]o bring into possession; to acquire; gain; get; to obtain by any means, as by purchase or loan").

The statutory term "procurement" is matched in breadth by the term "services"; the relevant definition in *Black's* for a "service" is

CDA applies generally to almost the entire gamut of government contracts: unless expressly exempted by statute, the Act applies any time an agency contracts to "get or obtain" *any* item of personal property or *any* service (including specifically the "construction, alteration, repair or maintenance of real property").

2. The CDA's structure.

The entire statutory scheme of the CDA confirms the expansive nature of the term "procurement." In determining the meaning of a statutory term, "a court must look to the structure and language of the statute as a whole." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (citation omitted). See, *e.g.*, *Harris* v. *United States*, 122 S. Ct. 2406, 2411-2412 (2002). The overall structure of the CDA – and in particular the narrowness of the statutory exceptions to the CDA's coverage – demonstrates the Act's broad applicability to contracts such as those at issue here.

Congress expressly exempted a few specific categories of agency procurement contracts from the CDA's scope. See pages 14-15, *infra*. However, Congress also mandated that *only* those exceptions "specifically provided" *within the CDA itself* could operate to exclude a contract from the statute's dispute-resolution mechanisms. See 41 U.S.C. § 602(a) ("[u]nless otherwise *specifically provided herein*, this Act applies to *any* express or implied contract * * * entered into by an executive agency * * *") (emphasis added).[5]

"[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." See BLACK'S LAW DICTIONARY, at 1372.

[5] Congress further provided in the CDA that "a contractor may bring an action directly on [a] claim in the United States Court of [Federal] Claims, *notwithstanding any contract provision, regulation, or rule of law to the contrary*." 41 U.S.C. § 609(a)(1) (emphasis added). See, *e.g.*, *OSHCO-PAE-SOMC* v. *United States*, 16

Given this statutory mandate, neither agencies nor courts have the authority to graft additional exceptions onto the CDA. "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). See also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 122 S. Ct. 441, 447 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)). But the NPS and the lower courts in this case have done just that: it is undisputed that none of the statutory exceptions exempts NPS concessions contracts from the CDA.

The CDA "specifically provide[s]" only the following few exceptions:

- Only executive agency contracts (and the contracts of specified non-appropriated fund entities) are covered by the CDA; contracts by the legislative and judicial branches are not included. See 41 U.S.C. § 601(2); *Erwin* v. *United States*, 19 Cl. Ct. 47 (1989); S. REP. NO. 95-1118, at 16.

- Agencies may exempt certain contracts with foreign governments and international organizations from the CDA (41 U.S.C. § 602(c)), because such contracts "are often regarded by other governments as being international agreements rather than conventional commercial transactions * * * [and thus] these agreements frequently provide that disputes arising during performance of the agreement will be re-

Cl. Ct. 614 (1989) (parties to a CDA-covered contract may not agree to limit the right of appeal to the Claims Court).

solved through consultation among the governments." 124 Cong. Reg. S18,641 (daily ed. Oct. 12, 1978) (statement of Senator Byrd).

- Maritime contracts are afforded special treatment under the CDA in order to preserve the district courts' traditional admiralty jurisdiction. See 41 U.S.C. § 603; S. REP. NO. 95-1118, at 18; *Whitey's Welding & Fabrication, Inc.* v. *United States*, 5 Cl. Ct. 284, 287 (1984) (Kozinski, C.J.).

- Contracts for the procurement of real property, while not "specifically" excluded from the CDA, are outside the scope of the CDA's applicability clause (41 U.S.C. § 602(a)) because such contracts fall within the eminent domain power. See 124 Cong. Rec. H10,729 (daily ed. Sept. 26, 1978) (statement of Rep. Kindness).[6]

- Finally, the CDA specifies that only *some* Tennessee Valley Authority ("TVA") contracts are subject to the CDA. 41 U.S.C. § 602(b). But for this provision, no TVA contracts would have been covered because the TVA is not an executive agency. This legislative compromise was designed to take account of the TVA's complicated status as a quasi-governmental entity. See 124 Cong. Reg. S18,640-S18,641 (daily ed. Oct. 12, 1978) (statement of Senator Byrd)).

[6] This limitation is a narrow one; although contracts for the *purchase* of real property are not governed by the CDA, *leases* of real property fall within the scope of the statute. See ROBERT T. PEACOCK & PETER D. TING, CONTRACT DISPUTES ACT ANNOTATED 1-6 (1998) (collecting cases). Similarly, contracts for the procurement of work *related to* real property, including the construction of new facilities and the maintenance of existing ones, are also explicitly covered by the CDA. See 41 U.S.C. § 602(a)(3).

Obviously, none of these exceptions excludes NPS concessions contracts from the CDA. But equally important is the fact that each of these exemptions is narrow and carefully cabined to address a specific legislative concern. None can plausibly be read to demonstrate any desire on the part of Congress to limit the CDA generally, to exempt concessions contracts, or to authorize agencies to choose to exclude other categories of contracts from the statute.

3. The CDA's background.

Were the plain language and statutory structure not sufficient, the background against which the CDA was enacted and the legislative purpose it was designed to serve would also warrant a broad and comprehensive reading of the Act's coverage.

Before the CDA was passed, the manner of resolving government contracts disputes had become exceedingly complex and unworkable. Each executive agency was left to its own devices to fashion a system (or systems) of dispute resolution. Many of these failed to meet the needs of either contractors or the government and frequently gave agencies far too much authority to determine the correctness of their own contract actions. Thus, the Senate Report explained that, prior to the CDA,

> the methods and forums for handling * * * disputes [under government contracts] exist[ed] by executive branch fiat. * * * The agency boards of contract appeals [were] appointed by, report[ed] to, and [were] paid by the agency involved in the dispute. Their subpena power [was] limited. Often they [had to] decide cases concerning action by high-level agency officials. * * * The predilections of different agencies * * * [brought] forth new provisions and procedures that [were] restrictive and uncoordinated.

S. REP. NO. 95-1118, at 2-3.[7]

In response, in November 1969 Congress established the "Commission on Government Procurement" "to promote the economy, efficiency, and effectiveness of procurement by the executive branch of the Federal Government." Pub. L. No. 91-129 § 1, 83 Stat. 269 (Nov. 26, 1969). As it was statutorily required to do (*id.* § 4), the Commission studied all aspects of government procurement and eventually released a four-volume Report. See REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972).

The Commission's Report called for sweeping changes. The Commission found that "patchwork solutions to procurement problems [would] no longer suffice" and that "there is urgent need for *a more unified approach* to procurement." 1 *id.* at 1-2 (emphasis added). The specific changes proposed by the Commission included those that eventually became the CDA. See 4 *id.* pt. G; S. REP. NO. 95-1118, at 4. The Commission "concluded that the system for resolving contract disputes need[ed] significant institutional and substantive change if it is to provide effective justice to the contractors and the Government." 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, at 3. In particular, the

---

[7] See also, *e.g.*, L. Spector, *The Contract Disputes Act of 1978 – Some Observations and Predictions*, 39 FED. B.J. 1, 4-6 (1980) (describing the "turmoil" that existed before the CDA); S. Jacoby, *The Contract Disputes Act of 1978: An Important Development*, 39 FED. B.J 10, 13-15 (1980) (discussing confusion and controversy that existed before the CDA about the effect of the "finality" provisions in standard disputes clauses and of the Wunderlich Act, which precluded judicial review unless the contractor could establish breach); C. Kipps, T. Kindness & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L.J. 585, 585 (1999) ("Prior to the CDA, the 'system' for resolving federal contract disputes can best be described as a mess.").

Commission found that contractors should be afforded "direct access to court," the "fully judicialized, totally independent forum that historically has been the forum within which contract rights and duties have been adjudicated." *Id.* at 23-24.

Congress took the Commission's advice to heart. In the CDA, Congress sought to protect government contractors' right to independent review in court, even – or perhaps especially – where an agency might prefer a dispute-resolution system that it could better control. Under the CDA, "a contractor may bring an action directly on [a] claim in the United States Court of [Federal] Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1); see note 5, *supra*. The Senate Report explained that direct access to court was critical to the fair resolution of disputes between the government and its contracting partners. "[T]he government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party." S. REP. NO. 95-1118, at 12.

Further implementing the Commission's suggestions, Congress designed the CDA to have "broad application in order to unify the diverse and often inconsistent procedures existing among the many procuring agencies" (S. REP. NO. 95-1118, at 17), thereby avoiding "[t]he predilections of different agencies" (*id.* at 3). See *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001) ("Congress could not have expressed itself more clearly to the effect that all contractor claims based on a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures * * *.") (citing *Paragon Energy Corp.* v. *United States*, 645 F.2d 966, 975 (Ct. Cl. 1981)).

Because two of the critical goals of the CDA were to protect the right of government contractors to seek de novo review in court even where an agency might prefer otherwise and to "unify" dispute-resolution mechanisms across subject matter and across agencies (S. REP. NO. 95-1118, at 11-12, 17), it follows that courts should not countenance agency attempts to defeat congressional intent by excepting their contracts from the CDA. See *Watch Hill*, *supra*. If agencies had the ability to craft their contracts so as to avoid the Act, the world of government contracting might rapidly return to that which existed prior to the CDA's enactment, with similar contract disputes resolved in different fora using different procedures and providing the contractor with different rights. That would plainly deny contractors the due process protections that the CDA sought to provide and subvert the "more unified approach to procurement" that the Commission on Government Procurement first recommended over 30 years ago (1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, at 1-2) and that Congress codified in the CDA.

B. NPS Concessions Contracts Fall Squarely Within The Scope Of The CDA.

As noted above, the NPS has never disputed that national park concessions contracts are "contracts," and it has never claimed that the CDA specifically exempts concessions contracts from its coverage. If these contracts are denied the protections of the CDA, it must be because they do not relate to the procurement of services or construction, repair, or maintenance of real property. However, NPS concessions contracts are manifestly contracts of these sorts. Both the breadth of the words "procurement" and "services" and the clear intent of Congress to establish a comprehensive contract dispute resolution mechanism counsel against giving the CDA a grudging interpretation.

1. When the NPS contracts with concessioners, it plainly "procur[es]" a wide range of "services" that have

been sought by the government. Thus, concessioners provide services directly or indirectly to visitors to the national parks, staff park facilities, construct, maintain, and repair federally-owned structures, and perform many related functions that promote the public's use and enjoyment of the national parks, all subject to pervasive regulation and supervision by the agency.

For example, under section 3(a)(1) of the Standard Concession Contract, the NPS is required to list within each concessions contract those "visitor services" that the concessioner "is required to provide * * * during the term of" the contract. See 65 Fed. Reg. at 26,064. Similarly, section 10(a) of the Standard Concession Contract provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. Plainly, the NPS is procuring services from concessioners pursuant to contract.

Rather than discuss the range of services contained within a concessions contract in the abstract, we refer the Court to a typical "prospectus" issued by the NPS for a concessions contract, in this case the prospectus issued on April 5, 2001 to procure services in operating "Accommodations, Facilities, and Services On the South Rim of Grand Canyon National Park." See J.A. 29-156 (excerpts of prospectus).[8]

---

[8] Whenever the NPS seeks to enter into a new concessions contract, it issues a "prospectus" that "describes * * * the business opportunity" (J.A. 37), instructs prospective concessioners how to submit a responsive proposal, explains the criteria that the agency will use to decide among competing bids, and includes the contract that the successful bidder will be required to sign. Prospectuses for three concessions contracts were included in the record before the district court: the South Rim of the Grand Canyon, Yellowstone National Park, and Antelope Point. The prospectus for the South Rim of the Grand Canyon is in relevant respects typical of these three and of other prospectuses issued since enactment of the 1998 Act. (Although the Grand Canyon contract is one of the larger concessions contracts in the national park system, all of the over 600 concessions contracts administered by the NPS include visitor services of some description.)

The Joint Appendix includes significant sections of the Grand Canyon prospectus, including the entirety of the proposed concessions contract that was to be signed by a successful bidder. The full (478-page) prospectus is available at *http://www.nps.gov/grca/concessions*.

This prospectus is replete with evidence that the purpose of NPS concessions contracts is to procure diverse services. Thus, page one of the "Business Opportunity" section explains the reason for the prospectus: "The National Park Service has determined that certain visitor services and facilities are necessary and appropriate to enhance visitors' enjoyment of the park, while ensuring that resources are protected." J.A. 37.[9] Similarly, the "Offeror's Transmittal Letter" that the NPS requires a bidder to sign before the agency will even consider that bidder's proposal stresses that the bidder is "offer[ing] to provide visitor services and facilities at Grand Canyon National Park in accordance with the terms and conditions specified in the draft new Concession Contract" included in the prospectus. J.A. 122. Most importantly, the draft contract itself (J.A. 64-116) (hereinafter "Grand Canyon Contract") goes into great detail about the range and types of services that "the concessioner is required to provide * * * during the term of [the] Contract." Grand Canyon Contract § 3(a)(1), J.A. 73.

---

[9] By setting forth this purpose, the NPS is merely acknowledging that it is utilizing the concessions contract to satisfy its statutory mandate under the NPS Organic Act to provide for the public enjoyment of the national parks. See Part C.3, *infra*.

The proposed Grand Canyon concessions contract requires the concessioner to provide all of the following types of visitor services:

1. Overnight Accommodations
2. Food and Beverage Service
   a. Food Service
   b. Lounge Service
   c. Transportation/Visitor Information Desks
   d. Concierge Services
3. General Merchandise
4. Transportation Services
5. Automobile Services
6. Mule Operations
7. Kennels for cats and dogs
8. Camper Services
9. Trailer Village
10. Reservation System
11. Other

Ibid., J.A. 73-76.

These headings alone do not adequately convey the wide range of services that the new Grand Canyon concessioner must provide. For example, the concessioner will be required to run 12 hotels or lodges, owned by the government, that together contain 922 rooms; to staff and operate nine gift shops, owned by the government; to operate scheduled bus tours; to provide locksmithing services; to operate a Laundromat; and to run 10 food-service locations, owned by the government, ranging from a "Limited Snack Bar" to a "Gourmet/Fine Dining Restaurant." See *ibid.* These are paradigmatic examples of "services," and are typical of the kinds of services that the government solicits from concessioners, both large and small, that operate throughout the national park system. It thus seems beyond question that the NPS is "procur[ing] * * * services" under this and other concessions contracts that exist to support visitation to the national parks.

2. In many concessions contracts, the NPS also procures the "construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(3).[10] For example, under Section 9(d) of the Grand Canyon Contract, the concessioner is required "to undertake and complete an improvement program,"[11] including building apartments for employees, "[r]elocat[ing]" a maintenance facility, "renovat[ing]" a service station, a watchtower, an auto shop, a lodge, "Hermits Rest," and "NPS Building One"; "design[ing] and construct[ing]" the "new Desert View Trading Post," and "demolish[ing] several facilities – all at an estimated cost of almost $8.5 million. See J.A. 94-95. The Grand Canyon concessioner will also be "solely responsible for maintenance, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." Grand Canyon Contract § 10(a), J.A. 96. The concessioner is required to perform all of these construction and maintenance services despite the fact that "[t]he United States retains title and ownership to all Concession Facilities" (*id.* § 2(e), J.A. 70); see also Pet. App. 20a (citing 16 U.S.C. § 5954(d)).[12]

---

[10] Because the NPS also uses concessions contracts for such things as outfitter and guide services that may not use fixed facilities within the park (see 1998 Act § 403(8), 16 U.S.C. § 5952(8)), not all concessions contracts are for the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(3)). Those contracts not covered by this section are nevertheless subject to the CDA, because they are contracts for "the procurement of services" (41 U.S.C. § 602(a)(2)). See Part B.1, *supra*.

[11] Section 9(d) of the Standard Concession Contract requires the NPS to "provide [a] detailed description" of the improvement program to be undertaken in each concessions contract. See 65 Fed. Reg. at 26,068.

[12] Sections 2(e) and 10(a) of the Standard Concession Contract (65 Fed. Reg. at 26,063, 26,068-26,069) are identical to the same provisions of the Grand Canyon contract.

3. Given these examples of the types of services provided by concessioners under NPS concessions contracts, it is not surprising that the Department of the Interior's own Board of Contract Appeals has repeatedly held that NPS concessions contracts are subject to the CDA: the government contracts with concessioners to procure numerous specific services, as well as to procure the construction, alteration, repair, or maintenance of real property. Thus, in *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994), where the contract "'required and authorized' [the concessioner] to provide stated accommodations, facilities and services, including [a] specified improvement and building program," (*id.* at *6), the IBCA concluded that

> [i]t is apparent from [the concessioner's] contractual responsibilities and from the introductory language of its concession contracts, which acknowledges that [the concessioner] is performing services for the benefit of the Government and the public * * *, that NPS has procured from [the concessioner] services, and construction, alteration, repair and maintenance of real property, within the ambit of the CDA.

Id. at *14. Similarly, in *R & R Enterprises*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989) the IBCA stressed that a concessions contracts "entered into by NPS is a procurement contract subject to the CDA, since it is for services that the Government itself would otherwise provide, and since no statutory exemption from the Act of exclusionary intent by Congress is evident." And just last year, the IBCA reiterated that, "at least in any concession contract where the concessioner is required to perform specific services or to make specific improvements to the land it occupies, * * * the contract is a procurement contract, subject to the Contract Disputes Act." *Watch Hill*, 2001 WL 170911, at *6.

In fact, the NPS *itself* once convinced the Court of Claims that "normal, legally mandated, procurement procedures" applied to a concessioner who contracted to provide "transportation services" to the general public at Yosemite National Park. See *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 558-559 & n.8 (Ct. Cl. 1978) (emphasis in original).[13] The NPS's argument in *Yosemite Park* was correct, as later courts and the IBCA have agreed; the CDA applies to national park concessions contracts. There is no statutory basis for the agency's current attempt to exempt its concessions contracts from the scope of the CDA.

4. That NPS concessions contracts are subject to the CDA is confirmed by the fact that many other federal agencies routinely accept the applicability of the statute to similar concessions contracts used to procure a wide range of goods and services. Thus, the CDA has been applied without challenge to disputes involving concessions contracts with the Army and Air Force Exchange Service ("AAFES"),[14] the

---

[13] We discuss below (at Part C.1) why the fact that the NPS paid for transportation services in *Yosemite Park* is irrelevant to CDA coverage.

[14] See, *e.g.*, *Int'l Hair*, ASBCA No. 50948, 01-1 BCA ¶ 31,393, 2001 WL 520821 (Apr. 25, 2001) (applying CDA to AAFES beauty shop concessions contract); *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 WL 238730 (Feb. 28, 2001) (applying CDA to AAFES concessions contract to run specialty shops at base exchange); *Home Entm't, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 WL 669405 (Aug. 23, 1999) (applying CDA to AAFES video rental concessions contract); *Outlaw Group, Inc.*, ASBCA No. 46,132, 96-1 BCA ¶ 27,949, 1995 WL 563830 (Sept. 13, 1996) (dismissing appeal because of failure to file claim but indicating that the CDA would apply to AAFES taxi concessions contract).

Army Corps of Engineers,[15] the Navy,[16] and the State Department.[17] That these other agencies comply unhesitatingly with the CDA is strong evidence that concessions contracts fall within the scope of the statute.[18]

C. The Reasons Offered By The NPS For Exempting Concessions Contracts From The CDA Are Insubstantial.

The NPS regulation (36 C.F.R. § 51.3) declaring that national park "[c]oncession contracts are not contracts within the meaning of the" CDA fails to provide any rationale to support that conclusion. However, throughout this litigation, and in support of the final regulation (see 65 Fed. Reg. at 20,635), the NPS has argued that its concessions contracts fall outside the scope of the CDA for three reasons.

---

[15] See, *e.g.*, *Renaissance Investments, Inc.*, ENGBCA No. 5704, 98-1 BCA ¶ 29,712, 1998 WL 199079 (Apr. 17, 1998) (applying CDA to concessions contract with Corps of Engineers for excursion boat and attendant facilities); *Pound* v. *United States*, No. 94-496C, slip op. at 1 n.1, 10 n.2 (Fed. Cl. Aug. 30, 1996) (applying CDA to concessions contract to operate a marina on land owned by the Corps of Engineers).

[16] See, *e.g.*, *Rice King*, ASBCA No. 43,352, 92-2 BCA ¶ 24,805, 1992 WL 34026 (Feb. 20, 1992) (applying CDA to fast food concessions contract at naval station).

[17] See, *e.g.*, *Senor Tenedor, S.A. de C.V.*, ASBCA Nos. 48502, 49272, 97-2 BCA ¶ 29,192, 1997 WL 484580 (Aug. 15, 1997) (applying CDA to State Department concessions contract for cafeteria food services at the embassy in San Salvador).

[18] Although on one occasion the Defense Commissary Agency argued that a concessions contract with a "bagger" at a commissary was not subject to the CDA, the Armed Services Board of Contract Appeals rejected that contention out of hand. See *Hernandez*, ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742, at *8-9 (Dec. 12, 2000) (finding agreement to be "a contract for the procurement of services").

First, the NPS has claimed that the CDA does not apply to its concessions contracts because, under many of these contracts, the government makes no direct monetary payment to concessioners. Second, although NPS concessions contracts obviously procure "services" and the "construction, alteration, repair or maintenance of real property," the NPS has claimed, and the D.C. Circuit held, that these contracts are not subject to the CDA because the procurements benefit the public rather than the government. Third, the NPS has claimed that, if the CDA governs contracts that benefit the public rather than the government, it is applicable only to those contracts that provide benefits to the public that the agency is statutorily obligated to provide.

None of these asserted limitations on the scope of the CDA has any basis in the language of that statute. Nor are the NPS's attempts to evade the coverage of the CDA consistent with Congress's intent to provide a comprehensive dispute resolution scheme to replace the morass that preceded the CDA's enactment. In any event, even if these implied limitations exist, they are inapplicable here, because in its concessions contracts the NPS *does* procure services that benefit the government directly as well as services to the public that the agency is obligated to provide.

1. Monetary payments are irrelevant to CDA applicability.

The NPS's first explanation why the CDA does not apply to concessions contracts – that the government does not make payments to the contractor (see Br. in Opp. 10) – is statutorily irrelevant. Unlike various other procurement statutes and regulations, CDA coverage is not conditioned on the expenditure of any specified amount of money. See 48 C.F.R. §§ 1.104, 2.101 (Federal Acquisition Regulation applies only to contracts involving appropriated funds). So long as the government provides its contracting partner with something of value in exchange for the procurement of goods or ser-

vices – which is necessary not under the CDA *per se* but under the more general rule that a contract requires mutual consideration – the CDA applies.

In fact, *Bonneville Associates* v. *United States*, 43 F.3d 649 (Fed. Cir. 1994), upon which the government itself relies (at Br. in Opp. 10), demonstrates that it is unnecessary for the government to incur monetary liability for the CDA to apply. As the Federal Circuit noted in *Bonneville Associates*, the CDA is applicable to contracts for the "acquisition by purchase, lease, or *barter*[] of property or services." See *id.* at 653 (emphasis added). Definitionally, the government makes no monetary payment in a barter situation; thus – contrary to the government's key contention – the expenditure of government funds cannot be critical to CDA applicability. See also, *e.g.*, *Bartlett & Co. Grain*, AGBCA No. 86-187-1, 91-1 BCA ¶ 23,415, 1990 WL 166521 (Oct. 18, 1990) (CDA applies to a "payment-in-kind" contract between the Commodity Credit Corporation and a contractor, involving the trade of corn for soybeans); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986) (CDA applies to contract involving exchange of grain for the retirement of a farm loan). NPS concessions contracts are themselves a type of barter; concessioners agree to provide services in exchange for access to government-owned properties and the opportunity to earn a profit.

Indeed, a formalistic distinction based on whether the government's payment for goods or services is made in cash as opposed to some other quantum of value – such as the business opportunity to operate a concession – would simply create opportunities for agencies to exempt themselves from the CDA by clever drafting of their procurement contracts.[19] Under this theory, if the NPS were to collect visitor revenues

[19] The government uses concessions contracts to procure a wide range of services. See Part B.4, *supra*.

and then send back a percentage to the concessioner, the CDA would apply. But if, as here, a concessioner were to collect the revenues in the first instance and then send a percentage to the NPS, the CDA would not apply. Congress can hardly have intended for important statutory protections of government contractors to turn on such whimsical distinctions – distinctions that agencies themselves are entirely at liberty to manipulate. See *Franchise Tax Board* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 339 (1990).[20] That would run roughshod over the statutory scheme, which was designed to *standardize* dispute-resolution mechanisms across agencies and across contracts. See pages 18-19, *supra*.

2. *A government procurement does not fall outside the scope of the CDA merely because it may be said to benefit the public as well as the government.*

CDA coverage also does not depend on whether the "benefit" of contractual goods or services "is provided to the government," to the public, or both. See Br. in Opp. 11. Although the court of appeals held that only procurements for the direct benefit of the federal government fall within the purview of the CDA (see Pet. App. 27a), there is no textual basis for this judge-made exception to the statute. Rather, the CDA on its face applies to *any* contract for "the procurement of" goods and services, regardless of who directly benefits from that procurement. Likewise, nothing in the background or legislative history of the CDA supports the proposition that the Act's applicability turns on subjective determinations of who may be said to "benefit" from a government pro-

[20] Compare *Int'l Hair*, 2001 WL 520821, at *2 (applying CDA to AAFES beauty shop concessions contract where AAFES paid percentage concession fee to concessioner) with *Harry Pohl KG*, 2001 WL 238730, at *1 (applying CDA to AAFES specialty shops concessions contract where concessioner paid percentage concession fee to AAFES).

curement. See *Total Med. Mgmt., Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting argument that agreements with a private company to provide medical care to military dependents were not subject to the CDA "because they are not procurement contracts for the benefit of the government" but instead "are solely for the benefit of the military dependents who receive the medical care.").

A recent statute confirms that the CDA applies to contracts that are not for the direct benefit of the government. The Long-Term Care Security Act of 2000 ("Long-Term Care Act"), Pub. L. No. 106-265, 114 Stat. 762 (codified at 5 U.S.C. §§ 9001-9009), "establishes a program under which federal civilian employees, members of the uniformed services, as well as civilian and military retirees can purchase private group long-term care insurance for themselves and certain qualified relatives at a discount." H.R. REP. NO. 106-610(1), at 6. Under this statute, the Office of Personnel Management ("OPM") is required to enter into "master contracts" with private insurance carriers who will then offer optional long-term care insurance. See 5 U.S.C. § 9003(a). Although the direct beneficiaries of a "master contract" between OPM and an insurance carrier are the federal employees and retirees who will be entitled to purchase coverage from that carrier, Congress assumed that the CDA would nonetheless cover any dispute between OPM and the insurer. Thus, Congress added one minor twist to the otherwise-applicable CDA coverage; *"[f]or purposes of applying the Contract Disputes Act* of 1978 to disputes arising under this chapter between a carrier and [OPM]" (5 U.S.C. § 9003(c)(3) (emphasis added)), contractors may sue in district court as well as the Court of Federal Claims (*id.* § 9003(c)(3)(B)).[21]

[21] The Long-Term Care Act also shows that there is no need for the government to incur a financial obligation to a contractor in order for the CDA to apply. See Part C.1, *supra*. OPM incurs no financial liability under the Long-Term Care Act. Rather, "[e]ach eligible individual obtaining long-term care insurance coverage [is] responsible for 100 percent of the premiums for such coverage" (see 5 U.S.C. § 9004(a)), and OPM will be reimbursed by the private insurers for any administrative costs (see *id.* § 9004(f)). Nonetheless, Congress unquestionably expected the CDA to apply to disputes between OPM and insurers. See *id.* § 9003(c)(3).

Congress's decision not to limit the CDA to contracts that directly benefit the government rather than the public is not only plain on the face of the statute, but also perfectly sensible. What government contract for the procurement of goods or services does not also benefit the public? As the Court of Claims has observed, "[i]t is hoped that *every* Government purchase 'benefits the public' in some way." *Yosemite Park*, 582 F.2d at 559 n.8 (emphasis in original). Thus, contracts to install equipment for the air-traffic-control system (see *Oliver Eng'g Servs.*, DOTCAB Nos. 2549, 2550, 94-2 BCA ¶ 26,920, 1994 WL 179768 (May 09, 1994)), to repair a post office (see *D.L. Kaufman, Inc.*, PSBCA Nos. 4159 *et al.*, 00-1 BCA ¶ 30,846, 2000 WL 348319 (Mar. 10, 2000), or to purchase ammunition for the military (see *Propellex Corp.*, ASBCA No. 50,203, 02-1 BCA ¶ 31,721, 2001 WL 1678757 (Dec. 27, 2001), are each covered by the CDA, yet plainly benefit the public in a substantial way.

For these reasons, as we discussed above (at 25), the NPS itself once persuaded the Court of Claims to apply "normal, legally mandated, procurement procedures" to a contract under which a concessioner agreed to provide "transportation services" to visitors in Yosemite National Park. See *Yosemite Park*, 582 F.2d at 558. The agency successfully argued that it was not bound by the terms of a cost-plus-percentage-profit transportation services contract, because under the rules applicable to procurement contracts the profit percentage provided for in that agreement was too high. The court held that neither the NPS nor the concessioner could avoid normal procurement laws by "characteriz[ing] the procurement of

[these] services for the public as the granting of a 'concession' to a specific contractor." *Ibid.*

Furthermore, even if a plausible line could be drawn between contracts that "directly" benefit the government and those that benefit the government only "indirectly" by benefiting the public (see Pet. App. 29a), conditioning CDA coverage on this gauzy distinction would undermine the legislative purpose of the Act. Were such a distinction to matter, it would lead to extensive satellite litigation as agencies assert that their contracts are not primarily for the benefit of the government. But the purpose of the CDA was to eliminate just such coverage dilemmas and to standardize the resolution of government contract disputes. See pages 18-19, *supra*; S. REP. NO. 96-1118, at 17. Similarly, the CDA would be undermined if agencies could exempt themselves from its coverage merely by including language in a contract that describes the benefits to the agency as in fact redounding to the public that the agency is supposed to serve.

By the same token, there is no statutory authority to limit the CDA to contracts that provide benefits to the public that the agency is *statutorily obligated* to provide. In addition, this limitation would again undermine the CDA's goals of simplifying and standardizing the dispute-resolution mechanisms applicable to government contracts. It would lead to satellite litigation not only over whether goods or services were primarily intended to benefit the public or the government but also over whether the government had an obligation to provide the goods or services in question. See *Ferens* v. *John Deere Co.*, 494 U.S. 516, 531 (1990). This Court should reject any effort to read this invented limitation into the CDA.

3. *NPS concessions contracts would be subject to the CDA even if the statute applied only to contracts that procure benefits for the government.*

Even if the CDA were limited to contracts that benefit the government directly, or that procure a benefit for the public that the agency is statutorily obligated to provide, NPS concessions contracts would still plainly be covered by the Act. The NPS's governing statutes explicitly state that the agency has an obligation to provide services to park visitors. Concessioners help the NPS to fulfill its statutory mandate to

> *promote and regulate the use* of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein *and to provide for the enjoyment of the same* in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added). Thus, the NPS must provide "accommodations, facilities, and services that * * * are *necessary and appropriate* for public use and enjoyment" of the national parks. 16 U.S.C. § 5951(b)(1) (emphasis added). In fact, the NPS is *required* to "utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors * * * of the National Park System." *Id.* § 5952.

Although these statutes speak for themselves, it is instructive that outside this litigation the NPS has forcefully and repeatedly asserted that these statutory directives form an important part of its mission. For example, Appendix 1 to the Grand Canyon prospectus states: "Concessioners in the national parks *join with the National Park Service in carrying out a part of the Service's mission.*" J.A. 140 (emphasis

added). Appendix 4 to the prospectus, which contains an excerpt from the "2001 NPS Management Policies," similarly explains that "[t]he National Park Service will provide, *through the use of concession contracts*, commercial visitor services within parks that are necessary and appropriate for visitor use and enjoyment." J.A. 153 (emphasis added). And in the portion of the prospectus entitled "The Park Area and Its Mission," the NPS states that

> [t]he need for commercial visitor services in Grand Canyon National Park is based on objectives for visitor use described in law, planning documents that exist for the park, and the judgment of management considering the way the park is currently used and the present objectives of the NPS.
>
> The NPS has determined that the facilities and services that are called for in this Prospectus are *necessary and appropriate* to the purposes of Grand Canyon National Park.

J.A. 63 (emphasis added).[22] Appendix 1 further stresses that

> The National Park Service has as its overall mission the preservation and public enjoyment of significant aspects of the nation's natural and cultural heritage. * * * The National Park service may provide "necessary and appropriate" facilities and services that

[22] This same section of the prospectus further explains that

> [Various Grand Canyon specific] legislative statements, in addition to the NPS Organic Act, as amended, effectively provide the foundation upon which park management is based. Management seeks to protect the natural and cultural resources of the park, while providing for "the benefit and enjoyment of the people" through resource-based interpretive programs *and appropriate public and concessions facilities*.

J.A. 51 (emphasis added).

> are desirable for the visiting public through concession contracts.
>
> These services include a wide variety of commercial visitor services from backcountry guiding to first-class hotel operations. All are provided by [concessioners]. *All exist for the purpose of providing park visitors with the services and accommodations that are necessary and appropriate* for their full enjoyment of America's National Park Service-administered areas.

J.A. 137-138 (emphasis added).[23]

The extent to which the NPS supervises its concessioners is yet further evidence that NPS concessions contracts exist to benefit the NPS and to further the agency's mission. The agency retains the right to "determine and control the nature, type and quality of the visitor services described in [its] contract[s], including, but not limited to, the nature, type and quality of the merchandise, * * * to be sold or provided by the Concessioners within" a national park. Standard Concession Contract § 3(d)(1), 65 Fed. Reg. at 26,064. And all of a concessioner's "rates and charges to the public must be approved by the Director." *Id.* § 3(e), 65 Fed. Reg. at 26,064. The extensive control that the NPS maintains over *every* facet of a concessioner's operations confirms that these services are in fulfillment of the NPS's statutory mandate to accommodate visitors in their enjoyment of the national parks.

It is for these reasons that the Comptroller General, in an opinion that criticizes the D.C. Circuit's decision in this case, recently held that his bid-protest authority, which extends to "contract[s] for the procurement of property or services" (31 U.S.C. § 3551(1)(A)), applies to NPS concessions contracts.

[23] See also, *e.g.*, "Gift Shop Mission Statement," J.A. 117 ("[t]he gift shops throughout the park play a primary role in assisting [the NPS] to meet [its] management objectives").

Where concessions contracts "include[] the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself," they are for the "procurement of services." *Starfleet Marine Transp., Inc.*, B-290,181, 2002 CPD ¶ 113, 2002 WL 1461877, at *5 (July 5, 2002).

Finally, notwithstanding the NPS's implausible assertion that only the public stands to "benefit" from the provision of goods and services in the national parks, it is separately beyond question that the *government itself* is the direct and principal beneficiary of the concessioners' contractual obligation to maintain and repair park facilities, which are *owned by the government*. A contract to repair the "South Rim Village Historic Area" and the "Bright Angel Lodge," and to "maintain[]" "all Concession Facilities," at Grand Canyon National Park (J.A. 95-96) is no different in this respect than contracts to maintain and repair the John F. Kennedy Center for the Performing Arts (see *Grunley Constr. Co.*, ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998)), the Smithsonian Museums (see *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table); *Libra Eng'g Inc.*, NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984)), or military installations in the Republic of Panama (see *J & J Maintenance, Inc.*, ASBCA No. 50,984, 00-1 BCA ¶ 30,784, 2000 WL 199758 (Feb. 15, 2000) – all of which are within the coverage of the CDA. Thus, it is clearly incontrovertible under section 3(a)(3) of the CDA (41 U.S.C. § 602(a)(3)), that every NPS concessions contract that involves the maintenance or improvement of real property is subject to the CDA.

* * * * *

We end where we began – with the language of 41 U.S.C. § 602(a). The CDA unambiguously applies to any contract entered into by an executive agency for either "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." Because *every* NPS concessions contract satisfies at least one of these tests, the NPS regulation (36 C.F.R. § 51.3) must be held invalid. The NPS was not authorized to engraft exceptions found nowhere in the CDA, nor was it at liberty to ignore the protective purposes of this comprehensive government contracting statute by exempting its concessions contracts from the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

DECEMBER 2002

Supreme Court U.S.
FILED
DEC 27 2002
OFFICE OF THE CLERK

No. 02-196

In the

Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT XANTERRA PARKS & RESORTS, LLC SUPPORTING PETITIONERS

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1900
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Respondent Xanterra Parks & Resorts, LLC

December 27, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 applies to contracts between the National Park Service and private parties that provide concession services, including the development, operation, and maintenance of facilities, such as restaurants, lodges, and gift shops, in the national parks.

RULE 29.1 STATEMENT

Xanterra Parks & Resorts, L.L.C. is a Delaware limited liability company headquartered in Colorado. Xanterra Parks & Resorts, L.L.C. was previously named Amfac Resorts, L.L.C. Among other activities, Xanterra Parks & Resorts, L.L.C. provides concession services at the Grand Canyon National Park (South Rim) and at other national parks under concession contracts with the National Park Service.

At the time of the proceedings in the court of appeals, the following is a list of parent companies, subsidiaries, or affiliates of Amfac Resorts, L.L.C. that had outstanding securities in the hands of the public: Amfac Hawaii, L.L.C.; Arvida/JMB Partners, L.P.; Carlyle Real Estate Limited Partnership-XIII; Carlyle Real Estate Limited Partnership-XIV; Carlyle Real-Estate Limited Partnership-XV; JMB Income Properties, Ltd.-V; JMB/245 Park Avenue Associates, Ltd.; and JMB/Manhattan Associates, Ltd. Since that time, Amfac Resorts, L.L.C. underwent corporate restructuring and, as noted above, changed its name to Xanterra Parks & Resorts, L.L.C.

Although Xanterra Parks & Resorts, L.L.C. has several parents in the chain of corporate control, Xanterra Parks & Resorts, L.L.C. currently has no parents that have outstanding securities in the hands of the public.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. The Contract Disputes Act 1

B. The NPS's Failed Attempts To Exempt Concession Contracts From The CDA 4

C. The 1998 Act And The NPS's Regulations 5

D. The Opinions Below 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA 10

A. An Agency Literally Has No Power To Act Unless And Until Congress Confers Power Upon It 11

B. Because Congress Did Not Delegate Authority Over The CDA To The NPS, The NPS's Regulations Exceed Its Statutorily Defined Grasp 16

II. THE NPS REGULATIONS ARE ALSO CONTRARY TO THE CDA'S PLAIN TERMS 19

A. The CDA By Its Terms Applies To NPS Concession Contracts 19

B. The NPS Has Provided No Legitimate Reason For Exempting NPS Concession Contracts From The CDA 25

1. It Makes No Difference That The NPS Does Not Make Payments To The Contractor 25

2. It Makes No Difference That NPS Contracts Also Benefit The Public 26

3. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 12, 14, 16, 18

Atlantic City Electric Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 15, 17

Bonneville Associations v. United States,
43 F.3d 649 (Fed. Cir. 1994) 25

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 10, 12, 17

Burnham v. Superior Court of California,
495 U.S. 604 (1990) 13

Burnside-Ott Aviation Training Center v. Dalton,
107 F.3d 854 (Fed. Cir. 1997) 3

Commissioner Internal Revenue v. Engle,
464 U.S. 206 (1984) 29

Consumer Product Safety Commission v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 29

Crandon v. United States,
494 U.S. 152 (1990) 16

Ethyl Corp. v. EPA,
51 F.3d 1053 (D.C. Cir. 1995) 14

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) 21

Kelley v. EPA,
15 F.3d 1100 (D.C. Cir. 1994) 15

Louisiana Public Service Commission v. FCC,
476 U.S. 355 (1986) 12

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 11

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001) 14, 18

Motion Picture Association of America, Inc. v. FCC,
309 F.3d 796 (D.C. Cir. 2002) 11, 14, 15

National Park Concessions, Inc.,
IBCA No. 2995, 94-3 BCA ¶ 27,104,
1994 WL 462401 (Aug. 18, 1994) 4, 20, 22

New York v. FERC,
122 S. Ct. 1012 (2002) 12

Oroville-Tonasket Irrigation Dist. v. United States,
33 Fed. Cl. 14 (1995) 5

Oshco-Pae-Somc v. United States,
16 Cl. Ct. 614 (1989) 3

R&R Enters.,
IBCA No. 2417, 89-2 BCA ¶ 21,708,
1989 WL 27790 (Mar. 24, 1989),
aff'd on reconsideration, 89-3 BCA ¶ 22,043,
1989 WL 75890 (Jul. 6, 1989) 4, 27

Secretary of the Interior v. California,
464 U.S. 312 (1984) 21

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 29

Thomas v. Chicago Park District,
534 U.S. 316 (2002) 20

Total Medical Management., Inc. v. United States,
104 F.3d 1314 (Fed. Cir. 1997) 5, 27

United States v. Corliss Steam-Engine Co.,
91 U.S. (Mem.) 321 (1875) 18

United States v. Mead Corp.,
533 U.S. 218 (2001) 12, 15

Vallely v. Northern Fire & Marine Insurance Co.,
254 U.S. 348 (1920) 13

Watch Hill Concessions, Inc.,
IBCA No. 4284-2000,
01-01 BCA ¶ 31,298,
2001 WL 170911 (Feb. 16, 2001) 4, 6, 7, 20, 22, 24, 30

Watchtower Bible and Tract Society v. Village of Stratton,
536 U.S. 150 (2002) 20, 23

Williams v. Taylor,
529 U.S. 362 (2000) 12

Wright v. West,
505 U.S. 277 (1992) 29

Yosemite Park & Curry Co. v. United States,
582 F.2d 552 (Ct. Cl. 1978) 4

Statutes and Regulations

Homeland Security Act of 2002,
Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) 29

5 U.S.C. § 706 9

16 U.S.C. § 1 26

16 U.S.C. § 17b 6

National Parks Omnibus Management Act of 1998,
Pub. L. No. 105-391, 112 Stat. 3497
(codified with certain exceptions
at 16 U.S.C. §§ 5951-5966) ..... passim

16 U.S.C. § 5951 27

16 U.S.C. § 5952 ..... 5, 27

16 U.S.C. § 5954(c) 26

16 U.S.C. § 5956 ..... 26, 27

16 U.S.C. § 5963 6

The Contract Disputes Act of 1978,
Pub. L. No. 95-563, 92 Stat. 2383
(codified at 41 U.S.C. §§ 601-13) ..... passim

41 U.S.C. § 602 ..... 9, 19, 26

41 U.S.C. § 607 16

41 U.S.C. § 608 ..... 3, 16

41 U.S.C. § 609 ..... 3, 17, 19

41 U.S.C. § 610 3

41 U.S.C. § 611 3

Concession Contracts,
65 Fed. Reg. 20,630 (Apr. 17, 2000) 6

Standard Concession Contract,
65 Fed. Reg. 26,052 (May 4, 2002) 22, 23, 27

36 C.F.R. § 13.65 21

36 C.F.R. § 7.96 21

Other Authorities

Hiestand, O.S. and Parler, W.C. *The Disputes Procedure Under Government Contracts: The Role of the Appeals Boards and the Courts*, 8 B.C. Indus. & Commercial L. Rev. 1 (1966) 2

Kipps, C., Kindness, T., and Hamrick, C. *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585 (1999) 1, 2

Lee, C. and Barr, S. *New Agency, New Rules—and a Cost; Bush Gets Management Freedom, and a Measure of Mistrust Among Workers*, WASH. POST, Nov. 14, 2002, at A31 29

BLACK'S LAW DICTIONARY (7th ed. 2000) 21

WEBSTER'S II NEW COLLEGE DICTIONARY (1995) 21

H.R. Rep. No. 105767 (1998) 28

S. Rep. No. 105-202 (1998) 5, 28

S. Rep. No. 95-1118 (1978) 2, 3, 16, 24

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) 2

Grand Canyon Contract, No. 14-10-9-900-158 (executed Mar. 26, 1969) 28

Yellowstone Contract, No. 14-10-9-900-227 (executed Apr. 20, 1970) 23, 24

As petitioner the National Park Hospitality Association's ("NPHA") briefing makes clear, the erroneous D.C. Circuit decision below represents the consummation of prolonged (and unlawful) efforts by the National Park Service ("NPS"). Those efforts have had as their goal the undermining of the Contact Disputes Act ("CDA") and the protections it affords to NPS concessioners. The NPS's position, if accepted, would allow *all* contracting agencies to interpret, and freely attempt to exempt themselves from, the CDA. If permitted, such self-declared exemptions pose mortal dangers for the CDA regime as a whole: Congress enacted the CDA precisely because of the recognized need to ensure that government contractors enjoy access to neutral courts and the same fundamental rights as parties involved in private contract disputes. If, notwithstanding the CDA's plain terms, agencies are permitted to fashion clever devices for obtaining CDA exemptions, then the CDA's usefulness as a bulwark against agency overreaching will be diminished or perhaps ended. For the reasons below, and those in the NPHA brief, this Court should reverse the D.C. Circuit decision holding that the CDA does not apply to NPS concession contracts, and vacate the NPS's unlawful regulations.

STATEMENT OF THE CASE

A. The Contract Disputes Act

Congress enacted the Contract Disputes Act of 1978 to ensure the fair and efficient resolution of disputes between the Federal Government and government contractors. Before the CDA, "the 'system' for resolving federal contract disputes . . . [was] a mess." Clarence Kipps, Tom Kindness, and Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585, 585 (1999). Disputes were resolved through a "mixture of

contract provisions, agency regulations, judicial decisions, and statutory coverage." S. Rep. No. 95-1118, at 2 (1978).

With no coherent system in place, "the methods and forums for handling such disputes" existed mainly "by executive branch fiat." *Id.* Government agencies took advantage of the unstructured system and were able to "circumscribe [] access" to courts by putting "terms and conditions in contracts that [were] not, in general, subject to negotiation." *Id.* at 5. For this and other reasons, the pre-CDA contracting system was "often too expensive and time consuming" and "fail[ed] to provide the procedural safeguards and other elements of due process that should be the right of litigants." *Id.* at 4. Contractors thus found themselves "caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." Kipps, *et al.*, *The Contract Disputes Act*, 4 Pub. Contract L.J. at 587; *see also* O. S. Hiestand, Jr. & William C. Parler, *The Disputes Procedure Under Government Contracts: The Role of the Appeals Boards and the Courts*, 8 B.C. Indus. & Commercial L. Rev. 1, 14 (1966) (discussing problems of the pre-CDA regime).

The CDA thus reflects critical steps taken by Congress to ensure access to courts, independent review of agency decisions, and that government contractors have the same fundamental rights as those available to parties involved in private contract disputes. *See generally* REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972). Congress designed the CDA to "provide[] a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 95-1118, at 1. It was Congress's intent that the CDA "have broad application in order to unify the

diverse and often inconsistent procedures" that had previously existed "among the many procuring agencies." *Id.* at 17.

To accomplish these goals, Congress reposited authority to administer the CDA not in the government agencies themselves (who are of course parties to government contract disputes), but in neutral arbiters—specifically, in the Court of Federal Claims and in independent agency boards of contract appeals (known as "BCAs"). *See* 41 U.S.C. §§ 606-609. Congress also included CDA provisions that ensure that disputes are resolved fairly and efficiently. Among other things, the CDA requires *de novo* review of agency contracting decisions, *see id.* § 609(a)(3), provides for interest on claims awarded by BCAs and courts, *see id.* § 611, grants BCAs subpoena, discovery, and deposition powers, *see id.* § 610, and establishes accelerated procedures for resolving smaller claims, *see id.* § 608.

Congress recognized that agencies would have strong incentives to subvert the CDA and attempt to prevent government contractors from benefiting from the CDA's procedural protections. Accordingly, Congress drafted the statute to make clear that the CDA applies "*notwithstanding any contract provision, regulation, or rule of law to the contrary.*" 41 U.S.C. § 609(a)(1) (emphasis added). Implementing this provision, courts have made equally clear that an agency cannot require a contractor to agree to waive rights granted under the CDA. *See Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997); *Oshco-Pae-Somc v. United States*, 16 Cl. Ct. 614, 619 (1989).

B. The NPS's Failed Attempts To Exempt Concession Contracts From The CDA

In the first appellate case on point, the NPS asserted that its concession contracts for obtaining visitor services in national parks are covered by all generally-applicable government procurement laws. In *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552 (Ct. Cl. 1978), the predecessor to the Federal Circuit agreed with the NPS and held that the "broad concession granting authority of the Secretary of the Interior did not relieve the NPS of the duty of complying with generally applicable procurement statutes." *Id.* at 558.

Within a few years, however, the NPS reversed course, and began going to extraordinary lengths to exempt itself from the CDA. The NPS has litigated the issue of the CDA's applicability to NPS concession contracts in three separate cases before the Department of Interior Board of Contract Appeals ("IBCA")—and has lost every one. Indeed, until this case, every judge to consider the issue that we are aware of has rejected the NPS's position and held that NPS concession contracts are covered by the CDA. *See Watch Hill Concessions, Inc.*, IBCA No. 4284-2000, 01-01 BCA ¶ 31,298, 2001 WL 170911 (Feb. 16, 2001); *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994); *R&R Enters.*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989), *aff'd on reconsideration*, 89-3 BCA ¶ 22,043, 1989 WL 75890 (Jul. 6, 1989). These IBCA decisions are binding on the NPS because of the authority delegated by the Secretary of the Interior to the IBCA to decide contract disputes, in addition to the authority granted to the IBCA by the CDA itself. The NPS has never appealed, much less successfully appealed, any of these adverse decisions.

Significantly, the IBCA's decisions on CDA applicability are fully consistent with similar on-point decisions of the Court of Federal Claims and the Federal Circuit. *See Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting a similar position taken by the government with respect to medical services contracts); *Oroville-Tonasket Irrigation Dist. v. United States*, 33 Fed. Cl. 14 (1995) (concluding that a contract to manage a dam providing irrigation was covered by the CDA because contractor fulfilled responsibilities assigned by Congress to the Secretary of Interior). Moreover, as indicated in the NPHA brief, courts and other BCAs have, during this same timeframe, routinely applied the CDA to a myriad of disputes concerning contracts for services analogous to those provided by national park concessioners. *See* NPHA Br. at 25-26.

C. The 1998 Act And The NPS's Regulations

Against this backdrop, Congress passed the National Park Service Concessions Management Improvement Act of 1998 ("1998 Act"). The 1998 Act made significant changes to the concessions management system. In particular, Congress designed the 1998 Act to rejuvenate the management of NPS concessions, which Congress believed had become unduly bureaucratic and no longer reflected contemporary business practices. *See* S. Rep. No. 105-202, at 38 (1998). To this end, Congress instructed the NPS to "utilize concession contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952.

The 1998 Act did not mention the CDA. It did not define concessions contracts as a special type of federal contract exempt from generally-applicable procurement laws. Nor

did it change the fundamental nature of concession contracting—as before, the NPS still contracted to have concessioners provide visitor accommodations, facilities, and services. Moreover, although the NPS continued to argue that the CDA should not apply to concession contracts, Congress included no language in the 1998 Act reversing the binding IBCA decisions that had already rejected the NPS's position on this point. While Congress expressly exempted concession contracts from other statutes, it did not exempt them from the CDA. *See* 16 U.S.C. § 5963 (stating that 40 U.S.C. § 303b does not apply to concession contracts); 16 U.S.C. § 17b (exempting concession contracts from the advertising requirements of 41 U.S.C. § 5).

Unwilling to accept and comply with its earlier litigating defeats, the NPS promulgated regulations implementing the 1998 Act that purport to exempt concession contracts from the CDA. *See* Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (JA 157-167). In the preamble to the regulations, the NPS boldly asserted that its regulations "supercede[d]" the IBCA's earlier binding decisions. *Id.* (JA at 164).

This latest NPS effort to evade the CDA has also been met with defeat before the Department of Interior's own Board of Contract Appeals. *See Watch Hill*, 2001 WL 170911. In *Watch Hill*, the IBCA thoughtfully considered—and ultimately rejected—all of the NPS's arguments for why the CDA is not applicable to concession contracts. In a carefully reasoned opinion, the IBCA stated that the contractor's "assertions that nothing has changed since [the IBCA's earlier decisions] seem[ed] considerably more accurate than NPS' twice-repeated, bold-faced-print, assertions that NPS' final rule, issued under the terms of the 1998 Act, 'supercedes'" those earlier decisions. *Id.* at *5.

The IBCA noted that "Congress determined in the CDA that a neutral adjudicator—*i.e.*, this Board—ought to resolve" contract disputes. *Id.* at *6. It then held that "in any concession contract where the concessioner is required to perform specific services or to make specific improvements to the land it occupies . . . , the contract is a procurement contract, subject to the Contract Disputes Act." *Id.* Accordingly, the NPS position in this case remains squarely at odds with that of the adjudicative body most directly responsible for applying the CDA to NPS concession contracts.

D. The Opinions Below

In November and December 2000, the NPHA, Xanterra Parks & Resorts, L.L.C. (which was then named Amfac Resorts, L.L.C.), and two other concessioners filed separate actions under the Administrative Procedure Act challenging the NPS's regulations and Standard Concession Contract. Among other things, the NPHA, Xanterra, and the other concessioners contended that the NPS's regulations were arbitrary, capricious, and otherwise contrary to law. They argued that, although the NPS had no authority to administer the CDA, its regulations improperly purported to exempt NPS concession contracts from the CDA, thereby depriving contractors of the CDA's essential protections.

As litigation progressed, the NPS acknowledged that its regulations were unlawful in several respects and agreed to revise them. The NPS refused, however, to eliminate the provisions relating to CDA applicability, even after its own Board of Contract Appeals had determined, in the *Watch Hill* case, that those regulations were unlawful. *See Watch Hill*, 2001 WL 170911.

On May 23, 2001, the district court granted summary judgment in the NPS's favor on most of the concessioners' remaining claims. In particular, it deferred to the NPS's interpretation that the CDA does not apply to concession contracts. *See* Pet. App. 68a-72a. It reached that decision, even though it determined that, under concession contracts, the NPS is "receiving services," and "bargaining for the maintenance of real property." Pet. App. 68a. The court concluded that, because concession contracts differ from "typical procurement contracts," the CDA was ambiguous. *Id.* The Court then deferred to the NPS's interpretation under *Chevron*. *See* Pet. App. 70a.

The court of appeals for the D.C. Circuit affirmed. It began, however, by rejecting the district court's reasoning, recognizing instead that the NPS "does not administer the Contract Disputes Act.," Pet. App. 27a, and, therefore, is not entitled to *Chevron* deference. But instead of striking down the regulations as outside the scope of the NPS's delegated authority, the D.C. Circuit proceeded to uphold them. Relying on an orphaned statement in the 1998 Act's legislative history, the court concluded that concession contractors are not entitled to the protections of the CDA because "the primary purpose of concessions contracts is" to provide services to park area visitors. Pet. App. 29a. According to the court, "[t]hat the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep" concession contracts "into the ambit" of the CDA. *Id.*

SUMMARY OF ARGUMENT

1. It is well-settled, as a matter of venerable constitutional and administrative law principle, that an executive agency may not promulgate even reasonable

regulations that claim the force of law, unless Congress has specifically delegated it the authority to issue those regulations. Indeed, the Administrative Procedure Act expressly requires a court to "hold unlawful and set asid[e]" agency action that exceeds the scope of the agency's "statutory jurisdiction." 5 U.S.C. § 706(2)(C). It is therefore remarkable that, in this case, the D.C. Circuit, on the one hand, correctly found that the NPS "does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions," Pet. App. 27a, but, on the other hand, failed to grasp the dispositive implications of this finding. Because Congress has not granted the NPS delegated authority to administer the CDA, the NPS regulations purporting to govern CDA applicability should be vacated.

2. The NPS regulations declaring concession contracts exempt from the CDA reflect in any event an impermissible construction of the CDA. The CDA by its terms applies to "any" contract entered into by an executive agency for the procurement of services; property; or the construction, alteration, repair or maintenance of real property. 41 U.S.C. § 602(a). NPS concession contracts fit comfortably within this statutory ambit. They *require* concessioners to provide certain services for the benefit of the NPS and park visitors, and they often *require* the construction of new buildings for the NPS, or the repair and maintenance of existing NPS buildings.

The NPS nonetheless argues that concession contracts are not covered by the CDA because they constitute a species of government "permits" that merely "authorize third parties to provide services to park area visitors." Pet. App. 27a, 69a. But this contention bears no relation to the undisputed and public record regarding the manner in which

the NPS runs its concessions program. Unlike "permits" (which by definition are permissive, not mandatory), NPS concession contracts are subject to pervasive NPS oversight and impose affirmative performance obligations on concessioners (that conform, both in substance and in their solicitation, to specific statutory requirements embodied primarily in the 1998 Act). Accordingly, because disputes over concession contracts (unlike disputes over permits) are likely to involve questions going to the adequacy of performance, the CDA's due process protections and uniform procedures are critically important.

The NPS has no meaningful response to this plain reading of the CDA, nor has it provided any persuasive policy reasons why NPS concessioners should not be entitled to the essential contractual protections that Congress has guaranteed. The NPS instead relies on flimsy and irrelevant distinctions, unmoored to the CDA's plain language, and on an orphaned statement from post-CDA legislative history. But, as this Court has repeatedly held, such formalistic distinctions and suspicious post-enactment history are not to be taken seriously, much less given decisive weight.

ARGUMENT

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA

An administrative agency's power to promulgate binding regulations is subject to fundamental constraints limiting those powers to authority delegated by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Regulations that exceed the scope of an agency's delegated authority are unlawful and cannot stand. *See* 5 U.S.C. § 706(2)(C). Indeed, without statutory authorization, an

agency may not "promulgate even reasonable regulations that claim the force of law." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002).

Here, the Government has failed to point to any statute granting it delegated authority to issue binding regulations governing CDA applicability. In fact, it has failed seriously to contest the D.C. Circuit's conclusion below that the NPS does not in any relevant sense administer the CDA. *See* Pet. App. 27a. These fundamental omissions are fatal to the challenged NPS regulations. Because the NPS has acted beyond its delegated authority, its regulations must be set aside as *ultra vires*—quite apart from the independent grounds for invalidating them as an impermissible CDA construction.

A. An Agency Literally Has No Power To Act Unless And Until Congress Confers Power Upon It

Our Constitution is grounded in the bedrock of a defined and limited delegation of legislative power from the people to the Congress. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As Chief Justice Marshall described it, the people's "original and supreme will organizes the government and assigns to different departments their respective powers." *Id.* In particular, the "*powers of the legislature are defined and limited*; and that those limits may not be mistaken or forgotten, the constitution is written." *Id.* (emphasis added).

This elemental constitutional precept applies in turn to executive agencies acting within the modern administrative state. Since legislative power under the Constitution comes ultimately by way of delegation from the people, it may come to rest in executive agencies only via valid statutory delegations from Congress, the repository of the people's

lawmaking authority in the first instance. This Court has accordingly recognized that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *New York v. FERC*, 122 S. Ct. 1012, 1023 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). Instead, it is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208.

It follows that in instances where, as here, an agency is denied *Chevron* deference on grounds that it does not administer a statute at all, that agency will necessarily lack authority to promulgate binding regulations governing the statute's applicability. The Court has recognized, to be sure, that some statutory delegations confer agency authority to act, but fall short of meriting full *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (granting *Chevron* deference only where Congress has delegated authority to make rules carrying the force of law, and "the agency interpretation claiming deference was promulgated in exercise of that authority"). In other words, while a congressional delegation is a "precondition" for *Chevron* deference, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see also Williams v. Taylor*, 529 U.S. 362, 387 n.13 (2000) ("[d]eference after the fashion of *Chevron* depends on delegation"), it is not a *sufficient* condition for deference. *See Mead Corp.*, 533 U.S. at 226-27.

What is remarkable here is that the D.C. Circuit failed to recognize that a congressional delegation, while perhaps not *sufficient* to confer lawmaking authority, is absolutely *necessary* for such authority. Hence, even as it reversed the district court and found that the NPS "does not administer the Contract Disputes Act, and thus may not have

interpretive authority over its provisions," Pet App. 27a, the D.C. Circuit failed to grasp the dispositive implications of this finding. Specifically, it failed to grasp that if the NPS lacks authority to administer the CDA, it also and necessarily lacks authority to issue binding regulations governing CDA applicability.

This straightforward conclusion is reinforced by the plain language of the Administrative Procedure Act. The APA expressly requires courts to "hold unlawful and set aside agency action" that exceeds the scope of an agency's "statutory jurisdiction" or "authority." 5 U.S.C. § 706(2)(C); *cf. Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353 (1920) (noting that because courts "are constituted by authority," if they act beyond their authority "their judgment and orders are regarded as nullities."); *Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (discussing history of rule that a judgment of court lacking jurisdiction is void). Tellingly, however, this basis for invalidating agency action is enumerated separately from the independent APA provision envisioning invalidations of agency actions "not in accordance with law." 5 U.S.C. § 706(2)(A). Here again, the D.C. Circuit should have recognized that, having held that the NPS's regulations "exceeds the scope of" the agency's "statutory jurisdiction," it was bound to set them aside quite apart from any questions of whether or not the NPS's particular statutory construction was or was not "in accordance with" the CDA. 5 U.S.C. § 706(2)(A), (C).

The D.C. Circuit's mistake is all the more puzzling in light of the fact that lower courts, including the D.C. Circuit itself, have heretofore successfully applied this Court's cases involving questions of agencies overstepping statutory delegations of authority. Settled D.C. Circuit law at the time of the decision below provides that, absent statutory

authorization, an agency's action "cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). In fact, the D.C. Circuit's caselaw rightly goes further still and emphasizes that courts should not "lightly presume[]" such delegated authority. *Id.* at 1082. As this Court's cases make clear, Congress must affirmatively authorize (either expressly or impliedly) an agency to make rules carrying the force of law. The mere fact that Congress has not *withheld* such authority is not a sufficient indication that Congress intended to delegate lawmaking powers to an agency. *See Adams Fruit*, 494 U.S. at 649 (rejecting the view that Congress's "failure to speak directly . . . creates a statutory 'gap' within the meaning of *Chevron*"). Instead, far more is required: "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*, [*Mead*,] and quite likely with the Constitution as well." *Michigan v. EPA*, 268 F.3d at 1082 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original)).

With the exception of its unexplainable decision below, the D.C. Circuit itself has successfully applied these bedrock principles time and again to invalidate agency regulations promulgated in the absence of delegated authority. In *Motion Picture Association of America, Inc. v. FCC*, for example, the D.C. Circuit addressed the validity of video description regulations promulgated by the FCC to improve programming for hearing and visually impaired individuals. *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). Relying on *Chevron* and *Mead*, the court held that because the FCC was unable to cite any statutory provision granting it this authority, the challenged FCC regulations had to be vacated. *See Motion Picture Ass'n*,

309 F.3d at 799. It made no difference, the court explained, that Congress had not "positively foreclose[d] agency rules mandating video description." *Id.* at 802, 805-06. Nor did it matter that the agency's rules may have been "highly salutary." *Id.* at 807. Rather, as the court succinctly noted, "[a]n agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress." *Id.* at 801. In *Atlantic City Electric Co. v. FERC*, the D.C. Circuit relied on very similar reasoning to vacate certain FERC regulations, admonishing FERC for attempting to deny affected electric utilities "the very statutory rights given to them by Congress." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002). And, in *Kelley v. EPA*, the D.C. Circuit vacated EPA regulations that it had determined exceeded that agency's delegated authority under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *See Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). *Kelley* explained that, although EPA could enact policy statements to "guide EPA's enforcement proceedings across the country," it could not take its policy positions, however reasonable, and enact them as binding legislative or interpretive rules carrying the force of law. *Kelley*, 15 F.3d at 1109; *see also Mead*, 533 U.S. at 234-35 (noting that interpretations contained in policy statements, agency manuals, and enforcement guidelines, as opposed to rulings intended to have the force of law, may be entitled to *Skidmore* deference.)

In sum, the D.C. Circuit, with the exception of the decision below, has properly applied this Court's administrative law precedents in holding that certain FCC, FERC, and EPA regulations were subject to vacatur—quite apart from arguments as to whether they reflected textually

permissible statutory constructions. Until the D.C. Circuit's puzzling decision below, no administrative law decision of this Court, or of the D.C. Circuit implementing this Court's precedents, had ever purported to uphold agency regulations promulgated in an acknowledged absence of a statutory delegation of authority. The D.C. Circuit's decision undermining this fundamental principle—traceable ultimately to Justice Marshall and the Founding—is seriously flawed and should be reversed.

B. Because Congress Did Not Delegate Authority Over The CDA To The NPS, The NPS's Regulations Exceed Its Statutorily Defined Grasp

Here, the NPS regulations should be vacated because Congress did not delegate authority to the NPS to administer the CDA, but instead assigned administrative authority over the CDA to the BCAs and to the Court of Federal Claims. *See* 41 U.S.C. §§ 606-609; *see also* S. Rep. No. 95-1118, at 12-13. The only executive authority delegated by Congress under the CDA is to the Office of Federal Procurement Policy, which is allowed only to "issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards" and to establish inflation indices for the value of "small claims." 41 U.S.C. §§ 607(h), 608(f). Congress thus "expressly established" the judiciary, and not the NPS, "as the adjudicator of private rights of action arising under the statute." *Adams Fruit*, 494 U.S. at 649; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) (rejecting *Chevron* deference where the statute "is not administered by any agency but by the courts").

Congress also made plain its intent to prevent agencies from usurping the BCAs' and Court of Federal Claim's role as neutral arbiters of contract disputes. The CDA

unambiguously states that "a party to a Government contract other than the Government" has the right to appeal any contract dispute to the agency board, or to bring a claim in the United States Court of Federal Claims "*notwithstanding any* contract provision, *regulation*, or rule of law to the contrary." 41 U.S.C. § 609(a)(1) (emphasis added).

Accordingly, because NPS has not been entrusted to administer, and thus has no authority to interpret, the CDA, its regulations exceed the scope of its delegated authority. Congress no more intended for NPS to establish binding regulations purporting to cut back the scope of the CDA, than it did for the NPS to issue regulations cutting back the scope of the APA. *Cf. Bowen*, 488 U.S. at 214 (Scalia, J., concurring) (agencies cannot engage in retroactive rulemaking when Congress prohibited it under the APA). Having correctly determined that the NPS "does not administer the [CDA]," Pet. App. 27a., the D.C. Circuit should have set aside the NPS regulations on grounds that the NPS had no authority to deny concessioners "the very statutory rights given to them by Congress." *Atlantic City Elec.*, 295 F.3d at 9.

Perhaps sensing the D.C. Circuit's mistake, the Government tepidly suggests that the NPS's authority to determine CDA applicability derives, not from the CDA itself, but from the 1998 Act. *See* Br. in Opp'n, at 16 ("[T]he court of appeals did not attempt to add limiting language to the CDA, but rather faithfully interpreted the language of the 1998 Act."). But this position too—if indeed the Government embraces it—cannot plausibly be maintained. At the outset, the 1998 Act does not mention the CDA, and this congressional "failure to speak" to the issue is dispositive. *Adams Fruit*, 494 U.S. at 649. Indeed, the Court in *Adams Fruit* held that that, although Congress "clearly

envisioned" a role for the Department of Labor in promulgating standards implementing the Migrant and Seasonal Agricultural Worker Protection Act, that delegation did not "empower" the agency "to regulate the scope of judicial power vested by the statute." *Id.* at 650. "It is fundamental," the Court explained, "that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id.* (citation omitted). Just so here. Although Congress expressly mandated a role for the NPS in administering the 1998 Act, it did not empower the NPS to regulate the scope of judicial power vested by an entirely different statute—the CDA.

More fundamentally, the NPS's position has no logical stopping point. This Court must be clear that any NPS attempts to rehabilitate the D.C. Circuit decision in this manner would effectively ask the Court to "presume a delegation of power" rendering the CDA a nullity. *Michigan v. EPA*, 268 F.3d at 1082. (emphasis omitted). Because any federal agency may enter into contracts for goods and services within their respective authorization and available appropriations, *see, e.g.*, *United States v. Corliss Steam-Engine Co.*, 91 U.S. (Mem.) 321 (1875), the NPS's position, if accepted, apparently would allow *all* contracting agencies to interpret, and freely attempt to exempt themselves from, the CDA or any other generally-applicable procurement law.

Fortunately, Congress itself recognized that agencies might well succumb to the attractions of a self-declared CDA exemption and also recognized the mortal dangers such self-declared exemptions would pose for the CDA regime as a whole. Congress was therefore careful to establish that CDA procedures and protections apply "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1). Hence, even assuming that the 1998

Act otherwise would supply grounds for exercising a power of CDA-exemption—which it does not—that implied power is foreclosed by express language in the CDA itself. The challenged NPS regulations are thus *ultra vires*, and subject to vacatur, under the plain terms of the CDA itself.

II. THE NPS REGULATIONS ARE ALSO CONTRARY TO THE CDA'S PLAIN TERMS

In addition to being beyond the NPS's delegated authority, the agency's regulations also reflect an impermissible construction of the CDA. As demonstrated below, and in the NPHA's brief, the CDA applies by its terms to NPS concession contracts, thus rendering the NPS regulations plainly "not in accordance with law." 5 U.S.C. § 706(2)(A).

A. The CDA By Its Terms Applies To NPS Concession Contracts

As the NPHA briefing emphasizes, the CDA is broadly worded to cover a wide range of government contracts. It applies by its terms to "*any* express or implied contract" entered into by "an executive agency" for "the procurement of" (1) "property, other than real property in being," (2) "services," or (3) the "construction, alteration, repair or maintenance of real property" 41 U.S.C. § 602(a) (emphasis added). NPS concession contracts fit comfortably within this statutory ambit. As the NPHA explains in detail, the CDA's plain language, structure, and background all confirm the CDA's applicability to concessions contracts. The overwhelming weight of decisional authority thus rightly rejects the NPS's persistent efforts to circumvent the CDA and holds instead that "in any concession contract where the concessioner *is required to perform specific services or to make specific improvements* to the land it occupies, . . . the

contract is a procurement contract, subject to the [CDA]." *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-01 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001); *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401, at *14 (Aug. 18, 1994). Indeed, as even the NPS must concede, it is difficult to imagine a concession contract that does not at least require the concessioner to perform specific services.

Before the D.C. Circuit, the NPS conceded that concessions contracts require concessioners to provide services and goods. It nonetheless successfully undermined the CDA by convincing that court (inexpert as it is on government contracts issues) that concession contracts are not "procurement" contracts. According to the NPS, concession contracts instead merely "authorize third parties to provide services to park area visitors." Pet. App. 27a, 69a. They accordingly, in the NPS view, constitute a species of government permits to operate businesses on government property. *See* Br. in Opp'n, at 5.

The striking fact about this contention is that it bears no relation either to the undisputed and fully public record respecting the manner in which the NPS runs its concessions contracting program, or the statutory framework upon which that program rests. This Court is well familiar with the type of relationship established between governments and private parties pursuant to permits. *See Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (striking down ordinance requiring permit to engage in door-to-door canvassing); *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (addressing constitutionality of permit requirement for conducting large-scale public events); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (recognizing that "government, in order to regulate competing uses of

public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally"); *Secretary of the Interior v. California*, 464 U.S. 312 (1984) (discussing permits required for the offshore exploration, production, and development of oil and gas). Moreover, the NPS itself is familiar with the critical distinction between permits and concessions contracts, as a result of the many situations in which it issues permits to regulate competing uses of park lands. *See* 36 C.F.R. § 7.96(b) (permit required for organized games in park areas); 36 C.F.R. § 7.96(c) (permit required to fly a model powered plane from any park area); 36 C.F.R. § 7.96(f) (permit required to operate certain commercial vehicles and common carriers on the George Washington Memorial Parkway); 36 C.F.R. § 7.96(g) (permit required for demonstrations or special events in park areas); 36 C.F.R. § 13.65 (permit required to engage in commercial fishing at Glacier Bay National Park).

As these examples together suggest, a "permit," most properly speaking, is "a document or certificate giving permission to do something." WEBSTER'S II NEW COLLEGE DICTIONARY (1995); *see also* BLACK'S LAW DICTIONARY (7th ed. 2000) (permit: "A certificate evidencing permission; a license") Unlike contracts involving *procurements*, "permits" do not impose affirmative obligations of performance; permits are permissive, not mandatory. Permits are required, for example, as a precondition to the sale or distribution of merchandise in certain park areas in Washington, D.C. *See* 36 C.F.R. § 7.96(k). But precisely because such merchandise is sold pursuant to permits, not concessions contracts, the permit-holder has no affirmative obligation to sell anything—performance is entirely within the permit-holder's discretion. And precisely because the government has no authority to require affirmative

performance, the sorts of dangers that the CDA was enacted to remedy—in particular, the risk of government contracting officers illegitimately demanding over-performance by contracting partners as a way of supplementing scarce appropriated funds—are greatly diminished. Disputes over permits are much more likely to concern the scope or validity of the permit itself, as opposed to intractable issues going to the adequacy of affirmative performance.

Given the policy reasons for the CDA's inclusion of procurements of services like NPS concessions contracts (which, unlike permits, impose affirmative performance obligations), it is not surprising that contracts for procurements typically are quite different from permits. For instance, unlike typical permits, NPS concession contracts are affirmatively solicited by the NPS, and take the form of binding, bilateral, written contracts. And unlike permits, NPS concession contracts are minutely tailored to impose affirmative obligations on concessioners that must be performed to the NPS's satisfaction. *See* Standard Concession Contract § 16, 65 Fed. Reg. 26,052, 26,072 (May 4, 2002). In the world of NPS concession contracting, it is therefore not unusual for factual disputes to arise over questions of performance. *See, e.g.*, *Watch Hill*, 2001 WL 170911 (noting that the NPS and its concessioner disagreed over whether the concessioner had breached the contract); *National Park Concessions*, 1994 WL 462401 (disagreement over allegedly defective specifications provided by the NPS under concessions contract).

Moreover, under NPS concessions contracts, unlike permits, the NPS is intimately involved in private business operations. NPS concessions contracts *require*—as opposed to simply permitting—concessioners to provide specific services for the benefit of the NPS and park visitors. *See*

Watch Hill, 2001 WL 170911, at *6. They also often *require* the construction of new buildings for the NPS, or the repair and maintenance of existing NPS buildings. In fulfilling these contractual obligations, the concessioner is subject to pervasive government oversight. Failure to perform to the NPS's satisfaction is grounds for termination if the NPS finds the concessioner has materially breached. *See generally* Standard Concession Contract § 16, 65 Fed. Reg. at 26,072.

The recently-terminated contract between the NPS and Hamilton Stores for concession services at Yellowstone National Park is typical of NPS concessions contracts. *See* Yellowstone Contract, No. 14-10-9-900-227 (executed Apr. 20, 1970) (the Yellowstone Contract is included in the record below, and a copy has been lodged with the Court). Under that contract, the NPS procured a wide-range of services. For example, the Yellowstone concessioner was *required*—not simply permitted—to provide merchandising services; food and beverage service; automobile service stations; photographic facilities and services; as well as studios, shops and stands for the purpose of selling pictorial souvenirs, maps, and recordings. *See* Yellowstone Contract § 2. In addition, the concessioner was *required* (subject to NPS oversight and approval) to undertake a substantial improvement and building program. *See* Yellowstone Contract § 1.

Under the Yellowstone contract, it was the NPS, not the private concessioner, who was in the driver's seat in controlling business operations. The NPS "reserve[d] the right to determine and control the nature and type of merchandise and services which may be sold or furnished by the Concessioner within the park." *Id.* § 2(b). Likewise, all rates and prices charged for such services were "subject to

regulation and approval by the Secretary." *Id.* § 3(b). If the concessioner failed to perform any one of these services or requirements to the NPS's satisfaction, the contract gave the NPS sole authority to terminate the contract at its discretion. *See* Yellowstone Contract § 11 ("[T]he Secretary shall have the power to determine whether there has been a default or unsatisfactory performance.").

Precisely because the government enjoys broad discretion over NPS concession contracts and other contracts reflecting procurements of services, and because such contracts are typically agency-drafted and non-negotiable, the CDA's due process protections and uniform procedures are critically important. When a concessioner's failure to fulfill the NPS's performance expectations is grounds for the NPS seeking to cancel a contract outright, *de novo* review by an impartial adjudicator is essential to protect the concessioner. *See Watch Hill*, 2001 WL 170911, at *6 ("Congress determined in the CDA that a neutral adjudicator . . . ought to resolve [] disputes" relating to the liabilities the NPS incurs when it terminates a contract). Likewise, because disputes over adequacy of performance can continually arise in these close working relationships, the CDA provides efficient and cost-effective procedures for resolving recurring claims. *See* S. Rep. No. 95-1118, at 2. As Congress itself recognized, absent CDA protections, it would be all too easy for the NPS and other government agencies to "circumscribe access" to the impartial courts. *Id.* at 2. Ironically, that is exactly what the NPS obtained below from the D.C. Circuit.

B. The NPS Has Provided No Legitimate Reason For Exempting NPS Concession Contracts From The CDA

The NPS has no meaningful response to this plain reading of the CDA, nor has it provided any persuasive policy reasons why NPS concessioners should not be entitled to the essential protections that Congress has guaranteed them. The NPS instead relies on formalistic distinctions and post-enactment legislative history entirely lacking in persuasive force.

1. It Makes No Difference That The NPS Does Not Make Payments To The Contractor

The NPS initially argues that the CDA does not apply because the NPS does not make payments directly to concession contractors. *See* Br. in Opp'n, at 12-13. This distinction is irrelevant, however, because nowhere in the statute is CDA coverage made conditional on the disbursement of government funds. So long as the government procures services—whether through direct payment or not—the CDA applies. *See Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994) (a "procurement" is "an acquisition by purchase, lease, or barter, or property or services"); *see also* NPHA Br. at 27-29.

Moreover, the NPS's distinction irrationally exalts form over substance. Congress has ensured by statute that concessioners will in fact receive payment for the services they contract with the government to provide. The 1998 Act provides, for example, that upon expiration or termination of a concessions contract, a concessioner is entitled "under the terms of the concessions contract to receive from the United States or a successor concessioner the value of any leasehold

surrender interest in a capital improvement as of the date of such expiration or termination." 16 U.S.C. § 5954(c). Likewise, the NPS is obligated under the 1998 Act to ensure that a concessioner has "a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract." 16 U.S.C. § 5956. The NPS is therefore statutorily *obliged* to ensure that concessioners obtain both a return *of* their investment at the end of the contract, and a reasonable opportunity to make a fair return over the contract term. The hollowness of the NPS formalisms is therefore apparent: Congress gave statutory assurances of proper payment, thus making irrelevant whether those payments are made directly or indirectly to concessioners.

2. It Makes No Difference That NPS Contracts Also Benefit The Public

The NPS also suggests that concession contracts are not covered by the CDA because they do not directly benefit the government. *See* Br. in Opp'n, at 14. This distinction, too, is irrelevant under the CDA, which applies by its terms to *any* contract for procurement of services, not just contracts that might principally benefit the government. *See* 41 U.S.C. § 602; *see also* NPHA Br. at 29-36.

But even assuming the CDA were rewritten as the NPS advocates, the NPS arguments still would fail. The fact is that the NPS as an agency greatly benefits from NPS concession contracts. *First*, as the NPHA brief emphasizes, NPS concession contracts are essential means of the NPS fulfilling its mandate to "provide for the enjoyment" of the national parks, 16 U.S.C. § 1, and "conserve the scenery and the natural and historic objects and the wild life therein," while providing "for the enjoyment of the same.'" Pet. App. 49a (quoting 16 U.S.C. § 1). The 1998 Act thus establishes that the NPS is statutorily *required* to "administer units of

the National Park Service in accordance with the fundamental purpose of conserving their scenery, wildlife, and natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations," 16 U.S.C. § 5951, and statutorily *required* to "utilize" concession contracts to achieve these objectives. *See* 16 U.S.C. § 5952. The important point, then, is that Congress itself envisioned the NPS's use of concessions contracts in fulfilling its mission. *See Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting argument that agreements between the military and a private health care company to provide medical services to military dependants were not subject to the CDA simply because they did not directly benefit the government). The NPS derives incalculable benefits by having private parties efficiently provide congressionally-mandated services and goods, rather than having to expend its own appropriated funds to provide these services itself. *See R & R Enterprises*, 1989 WL 27790, at *1 ("a concessionaire contract entered into by NPS is a procurement contract subject to the CDA, since it is for services that the Government itself would otherwise provide"). There could hardly be better evidence that NPS concessions contracts indeed benefit the government.

Second, even beyond its statutory mission, concession contracts directly benefit the NPS as an organization. NPS concessioners pay the NPS a percentage of gross receipts as franchise fee payments that go directly into NPS accounts, as opposed to general revenues. *See* Standard Contract § 11, 65 Fed. Reg. at 26,069. These franchise fee payments are significant, and they are relied on by the NPS to support activities throughout the park system. *See* 16 U.S.C. § 5956(c), (d). As the legislative history to the 1998 Act

makes clear, NPS revenues from concessions contracts have steadily increased, *see* S. Rep. No. 105-202, at 20, reaching almost $50 million annually by 1996. *See id.* Moreover, many NPS concession contracts require concessioners to undertake construction projects under contracts providing that "[t]he United States retains title and ownership to all Concession Facilities." *See, e.g.*, Grand Canyon Contract, No. 14-10-0-900-158, § 2(e) (executed Mar. 26, 1969). For example, under its current contract for Grand Canyon National Park, Xanterra is required to make approximately $8.5 million in improvements to buildings and structures inside national park boundaries. *See* NPHA Br. at 23 (citing JA 95-95). This construction, like the millions the NPS receives in franchise fee payments, directly inures to the NPS's benefit.

3. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant

Given the clarity of the CDA, and the flimsy and formalistic distinctions that the NPS cites to undermine it, it is not surprising that the NPS relies in the end on an orphaned statement found planted in the 1998 Act's legislative history. *See* S. Rep. No. 105-202, at 39; H.R. Rep. No. 105767, at 43 (1998). According to the NPS, legislative history from the 1998 Act purporting to interpret the scope of the CDA "confirms that Congress . . . distinguished concession contracts from ordinary procurement contracts." Br. in Opp'n, at 15.

Whatever role legislative history might typically play in statutory interpretation, it surely deserves no role here. The 1998 Act contains no statutory language that could possibly be construed to modify the CDA's scope. This situation is therefore governed by this Court's decisions holding that legislative history appearing in a later statute should not be

taken seriously when it purports to redefine earlier legislation. Such post-enactment legislative history has little—if any—value. *See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 & n.13 (1980); *see also Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (expressing "grave doubts" whether post-enactment legislative history "is of any value"); *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (acknowledging the inherent difficulties in relying on subsequent legislative history).

More fundamentally, there are substantial dangers in letting agencies circumvent plain statutory terms through opportunistic reliance on subsequent "legislative" history that may in fact have been promoted by the agency itself. *See GTE Sylvania, Inc.*, 447 U.S. at 117-118 (reiterating the "oft-repeated warning" that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (citation omitted); *see also Commissioner Internal Revenue v. Engle*, 464 U.S. 206, 223 n.21 (1984) (giving no weight to "deliberations in subsequent sessions of Congress[] that never culminated in legislation"). Consider, for example, the recent, well-publicized controversy over personnel protections for federal employees affected by the Homeland Security Act of 2002. *See* Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002). News reports of the enactment of that legislation indicate that its Executive Branch proponents succeeded in obtaining additional authority to control the hiring, firing and transferring of federal employees, but only after making a number of substantive legislative compromises. *See, e.g.*, Christopher Lee & Stephen Barr, *New Agency, New Rules—and a Cost; Bush Gets Management Freedom, and a Measure of Mistrust Among Workers*, WASH. POST, Nov. 14, 2002, at A31. Under the NPS's approach, the Homeland Security Act's

proponents might have avoided those compromises merely by ensuring that their views were slipped into some convenient vessel of legislative history, or, worse still, the committee reports accompanying subsequent legislation. Simply put, "[c]ommittee report language is no longer simply a means of explaining the intent of new statutory language; it is now just as frequently used to impose the report writer's views on an agency in the absence of the votes necessary to pass a statutory change." *Watch Hill*, 2001 WL 170911, at *5 (rejecting NPS's position that legislative history can be used to exempt concession contracts from the CDA).

The D.C. Circuit's misuse of legislative history thus puts at risk, not just NPS concessions, or businesses with Government contracts, but anyone who relies on federal statutes to protect their relationships with a government agency—including federal agency employees. The D.C. Circuit's legislative history rationale is perhaps its most misguided grounds for its fundamentally misguided decision.

CONCLUSION

For the foregoing reasons, and those spelled out in the brief of petitioner NPHA, this Court should reverse the judgment of the court of appeals and vacate the NPS's regulations.

Respectfully submitted,

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1900
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorney for Respondent
Xanterra Parks & Resorts, LLC

December 27, 2002

FILED
JAN 27 2003
OFFICE OF THE CLERK

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

80 pp

QUESTION PRESENTED

Whether a National Park Service regulation that states that National Park Service concession contracts are not procurement contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is facially valid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	1
Statement	2
A. The statutory and regulatory framework	2
1. National Park Service concessions	2
2. The Contract Disputes Act of 1978	7
B. Proceedings in this case	8
Summary of argument	10
Argument:	
The Secretary correctly determined that concession contracts are not "procurement contracts" under federal procurement law	12
I. The Secretary's judgment regarding the nature of concession contracts under the distinct regulatory regime created by Congress warrants deference	12
II. National Park Service concession contracts are not procurement contracts under federal procurement law, including the Contract Disputes Act	16
A. The text and history of the Contract Disputes Act demonstrate that it applies only to contracts involving the use of a government entity's funds to acquire goods or services for government use	16
1. The language of the Contract Disputes Act indicates that it applies only to transactions involving the procurement of property or services by and for the federal government using government funds	17

Table of Contents—Continued: Page

2. Consistent statutory and regulatory practice confirms that the Contract Disputes Act applies only to contracts involving the procurement of property or services by and for the federal government using government funds 20

B. National Park Service concession contracts do not come within the scope of the Contract Disputes Act 27

C. Concession contracts do not implicate the purposes that animated the Contract Disputes Act 38

D. Recognizing that the CDA does not cover concession contracts will not lead to abuses 40

III. Congress's historically distinct regulatory scheme for NPS concessions confirms that concession contracts are not "procurement contracts" under federal procurement law 42

A. Congress has historically distinguished between NPS concession contracts and procurement contracts 42

B. The text of the 1998 Act reflects the historical distinction between concession contracts and procurement contracts 44

C. Congress has ratified the National Park Service's long-held view that NPS concession contracts are not procurement contracts under federal procurement law 46

Conclusion 50

Addendum 1a

TABLE OF AUTHORITIES

Cases: Page

Abernethy v. *Cates*, 356 S.E.2d 62 (Ga. Ct. App. 1987) 32

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990) 16

Atlantic City Elec. Co. v. *FERC*, 295 F.3d 1 (D.C. Cir. 2002) 16

B.D. Click Co. v. *United States*, 614 F.2d 748 (Ct. Cl. 1980) 36

Bailey v. *United States*, 46 Fed. Cl. 187 (2000) 27, 39

Barnhart v. *Walton*, 122 S. Ct. 1265 (2002) 14

Bartlett & Co. Grain, No. 86-187-1, 1990 WL 166521 (ASBCA Oct. 18, 1990) 29

Blanco-Mora Enters., Inc., No. 94-5-136-C5, 1994 WL 248163 (HUDBCA June 10, 1994) 35

Board of Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 19

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 14

CFTC v. *Schor*, 478 U.S. 833 (1986) 49

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 15-16

Cleveland v. *United States*, 531 U.S. 12 (2000) 29

Coffey v. *United States*, 626 F. Supp. 1246 (D. Kan. 1986) 29

Crystal Cruises, Inc., No. B-238, 1990 WL 277630 (Feb. 1, 1990), aff'd on reconsideration, 1990 WL 278100 (Comp. Gen. June 14, 1990) 34

Delta S.S. Lines, Inc. v. *United States*, 3 Cl. Ct. 559 (1983) 11, 35

Erlenbaugh v. *United States*, 409 U.S. 239 (1972) 26, 46

Ervin & Assocs., Inc. v. *United States*, 44 Fed. Cl. 646 (1999) 27

Essex Electro Eng'rs, Inc. v. *United States*, 960 F.2d 1576 (Fed. Cir.), cert. denied, 506 U.S. 953 (1992) 19

Cases—Continued: Page

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 18
Fort Sumter Tours, Inc. v. *Andrus*, 564 F.2d 1119 (4th Cir. 1977) 39
G.E. Boggs & Assocs., Inc. v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992) 16, 27, 28
Grunley Constr. Co., No. 6327, 1998 WL 835156 (Army Corps Eng'rs BCA Nov. 20, 1998) 32
Hamilton Stores v. *Hodel*, 925 F.3d 1272 (10th Cir. 1991) 39
H.L. Smith, Inc. v. *Dalton*, 49 F.3d 1563 (Fed. Cir. 1995) 19
Hernandez, No. 53,011, 2000 WL 1844742 (ASBCA Dec. 12, 2000) 30
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) 33
Institut Pasteur v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) 27, 28, 41
Janowsky v. *United States*, No. 92-5004, 1993 WL 36863 (Fed. Cir. Feb. 17, 1993) 36
J&J Maint. Co., No. 59,984, 2000 WL 199758 (ASBCA Feb. 15, 2000) 32
Kelley v. *EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995) 16
Libra Eng'g Inc., No. 1182-17, 1984 WL 13526 (NASABCA July 13, 1984) 32
Lorillard v. *Pons*, 434 U.S. 575 (1978) 49
Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 17
Michigan v. *EPA*, 268 F.3d 1075 (D.C. Cir. 2001) 16
Motion Picture Ass'n of Am., Inc. v. *FCC*, 309 F.3d 796 (D.C. Cir. 2002) 16
National Park Concessions, Inc., No. 2995, 1994 WL 462401 (IBCA Aug. 18, 1994) 37

Cases—Continued: Page

NISH v. *Cohen*, 247 F.3d 197 (4th Cir. 2001) 14
New Era Constr. v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) 35
Niko Contracting Co. v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) 32
Pound v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1989) 30
R&R Enters., No. 2417, 1989 WL 27790 (IBCA Mar. 24, 1989) 36, 37
Reflectone, Inc. v. *Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) 19
Reno v. *Flores*, 507 U.S. 292 (1993) 33
Reno v. *Koray*, 515 U.S. 50 (1995) 18
Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 26
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 15
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 14
Starfleet Marine Transp., No. B-290, 2002 WL 1461877 (Comp. Gen. July 5, 2002) 37
Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997) 30
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) 15
United States v. *Poff*, 926 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 827 (1991) 17
United States v. *Salerno*, 481 U.S. 739 (1987) 33
Watch Hill Concession, Inc., No. 4284-2000, 2001 WL 170911 (IBCA Feb. 16, 2001) 37-38
Winstar Corp. v. *United States*, 21 Cl. Ct. 112 (1990), aff'd, 64 F.3d 1531 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996) 36
Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 30

Case—Continued: Page

YRT Servs. Corp. v. *United States*, 28 Fed. Cl. 366 (1993) 6, 10, 13, 30, 39, 41

Statutes and regulations:

Act of Mar. 7, 1928, ch. 137, § 1, 45 Stat. 235 42
Act of May 26, 1930, ch. 324, § 3, 46 Stat. 382 43
Act of Nov. 26, 1969, Pub. L. No. 91-129, § 1, 83 Stat. 269 22
Act to Establish a National Park Service, ch. 408, 39 Stat. 535 (16 U.S.C. 1 *et seq.*) 1, 3, 13, 19, 33, 42, 43
16 U.S.C. 1 (§ 1, 39 Stat. 535) 3, 11, 22, 34
16 U.S.C. 1a-2(f) 43
16 U.S.C. 3 (§ 3, 39 Stat. 535) 3, 14
16 U.S.C. 17b 43
16 U.S.C. 17i 43
Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (10 U.S.C. 2302 *et seq.*) 20, 44
10 U.S.C. 2303(a) (§ 2(a)) 21, 45
10 U.S.C. 2304(a)(1) 48
10 U.S.C. 2304(b)(1) 44
10 U.S.C. 2304(b)(2) 44
Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (41 U.S.C. 601 *et seq.*) 2, 7
41 U.S.C. 602(a) 8, 16, 18, 24, 26, 36
41 U.S.C. 602(a)(2) 9
41 U.S.C. 602(a)(3) 9
41 U.S.C. 602(a)(4) 8, 30-31
41 U.S.C. 609(a)(1) 7, 38
41 U.S.C. 609(b) 36
41 U.S.C. 611 ..... 7-8, 38
41 U.S.C. 612(c) 19
Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (31 U.S.C. 6301 *et seq.*) 25, 26, 37
31 U.S.C. 6301-6308 25

Statutes and regulations—Continued: Page

31 U.S.C. 6303 ..... 11, 25, 30, 31, 33, 34, 45
31 U.S.C. 6304 25
41 U.S.C. 501-509 (Supp. 1979) (recodified at 31 U.S.C. 6301-6308) 25
41 U.S.C. 503 (Supp. 1979) (recodified at 31 U.S.C. 6303) 11, 25
41 U.S.C. 504 (Supp. 1979) (recodified at 31 U.S.C. 6304) 25
41 U.S.C. 505 (Supp. 1979) (recodified at 31 U.S.C. 6305) 25
Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (41 U.S.C. 251 *et seq.*) 21, 44
41 U.S.C. 252(a) (§ 302(a), 63 Stat. 393) 21, 44
41 U.S.C. 252(b) (§ 302(a), 63 Stat. 393) 21, 45
41 U.S.C. 253(a)(1) 48
41 U.S.C. 253(b)(1) 44
Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, Tit. II, § 206, 102 Stat. 2294 35
National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304(a), 110 Stat. 659 18
National Park Service Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969 (16 U.S.C. 20 *et seq.*) (1994) 3, 4, 7
16 U.S.C. 20a (1994) 4, 43
16 U.S.C. 20d (1994) 4
16 U.S.C. 20e (1994) 4
National Park Service Concessions Management Improvement Act of 1998, Pub. L. No. 105-391, Tit. IV, §§ 401-418, 112 Stat. 3503-3517 (16 U.S.C. 5951-5966) ..... *passim*
16 U.S.C. 5951(a) 29
16 U.S.C. 5952 (§ 403, 112 Stat. 3504) 5, 6, 10, 13, 44
16 U.S.C. 5952(5) 29

Statutes and regulations—Continued: Page

16 U.S.C. 5952(5)(A)(iv) 48
16 U.S.C. 5952(7)(A) 5
16 U.S.C. 5952(7)(B) 5
16 U.S.C. 5952(8) 5
16 U.S.C. 5954(a)(3) 5
16 U.S.C. 5954(a)(4) 5
16 U.S.C. 5954(b)(2) 39, 46
16 U.S.C. 5956(b) 39, 46
16 U.S.C. 5959(a)(1) 45
16 U.S.C. 5959(a)(2) 45
16 U.S.C. 5965 14
§ 415(b)(1), 112 Stat. 3515 47
National Park Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 5
Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (41 U.S.C. 403 *et seq.*) 2, 23, 24, 26
41 U.S.C. 401 (Supp. 1979) (§ 2) 24
41 U.S.C. 405(a) (§ 6(a)) 24
41 U.S.C. 405(c) (§ 6(c)) 24
41 U.S.C. 405(d)(1) (§ 6(d)(1)) 23
41 U.S.C. 405(i)(1) 24
41 U.S.C. 423(f)(4) 18
Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 649 24
Rev. Stat. (1875):
§ 3709 42
§ 3710 42
10 U.S.C. 1076(a)(1) 30
20 U.S.C. 41 32
20 U.S.C. 53a 32
40 U.S.C. 303b (2002) (recodified at 40 U.S.C. 1302) 44
41 U.S.C. 5 45
10 C.F.R. 851.102 (1948) 21

Statutes and regulations—Continued: Page

32 C.F.R.: 30
Section 1-102 (1978) 21
Section 199.1(e) 30
36 C.F.R. Pt. 51:
Section 51.1 (1993) 4, 5, 47
Section 51.3 (1993) 4
Section 51.3 ..... 2, 6, 13, 33, 43
Section 51.5(b) (1993) 4
41 C.F.R. 1-1.208 (1959) 21
41 C.F.R. 1-1.208 (1978) 21
48 C.F.R.:
Ch. 1 (Federal Acquisition Regulation) 19
Section 2.101 19
Section 7.503(c)(17)(i) 19
Section 25.601(a)(3)(i)(F) 19-20

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 18, 28, 29
George C. Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 Denv. U. L. Rev. 729 (1997) 4
Concessions Reform: Hearings Before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources, 103d Cong., 1st Sess. (1993) 31
69 Cong. Rec. 3710 (1928) 29, 33, 43
72 Cong. Rec. 9159 (1930) 43
124 Cong. Rec. (1978):
p. 36,264 26
p. 36,267 26
140 Cong. Rec. 5518 (1994) 49
Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable From Nonappropriated Funds* (1976) 25
55 Fed. Reg. (1990):
p. 45,893 41
p. 45,894 41

Miscellaneous—Continued: Page

57 Fed. Reg. (1992):
p. 40,496 4
p. 40,498 ..... 5, 47
p. 40,503 ..... 5, 49
pp. 40,508-40,510 4
65 Fed. Reg. (2000):
p. 20,630 ..... 3, 4, 13
pp. 20,630-20,631 6
p. 20,635 ..... 6, 10, 13, 34, 43
pp. 20,668-20,669 6
p. 26,072 40
p. 44,894 ..... 6, 7
p. 44,905 40
p. 44,916 40
pp. 44,916-44,917 40
H.R. Rep. No. 948, 71st Cong., 2d Sess. (1930) 43
H.R. Rep. No. 670, 81st Cong., 1st Sess. (1949) 21
H.R. Rep. No. 591, 89th Cong., 1st Sess. (1965) 4, 33
H.R. Rep. No. 1556, 95th Cong., 2d Sess. (1978) 27
H.R. Rep. No. 767, 105th Cong., 2d Sess. (1998) 12, 46, 47, 50

Interior Department Appropriation Bill: Hearings Before a Subcomm. of the Senate Comm. on Appropriation, 70th Cong., 1st Sess. (1928) 42

James F. Nagle, *A History of Government Contracting* (2d ed. 1999) 7

Ralph C. Nash, Jr. et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* (2d ed. 1998) 11, 18, 19

National Park Concessions Measures: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs, 102d Cong., 1st Sess. (1991) 48

National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources, 103d Cong., 1st Sess. (1993) 31-32, 47, 48

Miscellaneous—Continued: Page

National Park Service Concessions Policy Reform Act of 1991: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources, 102d Cong., 2d Sess. (1992) 47

Robert T. Peacock, *A Complete Guide to the Contract Disputes Act* (1986) 27

1 Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2002) 14

Report of the Commission on Government Procurement (1972):
Vol. 1 7
Vol. 3 ..... 15, 22, 23
Vol. 4 ..... 38, 39

William A. Sabin, *The Gregg Reference Manual* (9th ed. 2001) 17

S. Rep. No. 571, 80th Cong., 1st Sess. (1947) 20, 21
S. Rep. No. 765, 89th Cong., 1st Sess. (1965) 4
S. Rep. No. 449, 94th Cong., 1st Sess. (1977) 15, 25
S. Rep. No. 1118, 95th Cong., 2d Sess. (1978) 8, 27, 38, 39, 40
S. Rep. No. 274, 100th Cong., 2d Sess. (1988) 35
S. Rep. No. 202, 105th Cong., 2d Sess. (1998) 5, 12, 46, 47, 50

In the Supreme Court of the United States

No. 02-196

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 282 F.3d 818. The opinion of the district court (Pet. App. 35a-92a) is reported at 142 F. Supp. 2d 54.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002. A petition for rehearing was denied on May 8, 2002 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on August 6, 2002, and granted by the Court on November 12, 2002 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, are reprinted at Add., *infra*, 1a-3a.

Relevant provisions of the National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. 5951-5966, are reprinted at Add., *infra*, 3a-9a. Relevant regulations of the National Park Service are reprinted at Add., *infra*, 10a. Relevant provisions of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, are reprinted at Add., *infra*, 10a-15a. Relevant provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. 403 *et seq.*, are reprinted at Add., *infra*, 15a-17a.

STATEMENT

This case involves a facial challenge to a regulation promulgated by the National Park Service (NPS) providing, in relevant part, that "concession contracts," *i.e.*, contracts that "authorize[] the concessioner to provide certain visitor services within a park area under specified terms and conditions," are not "contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act)" and are not "procurement contracts within the meaning of statutes, regulations or policies that apply * * * [to] federal procurement actions." 36 C.F.R. 51.3. Petitioner seeks reversal of a court of appeals judgment upholding the validity of that regulation. Petitioner contends that the regulation is invalid on its face because "*every* NPS concessions contract" is a procurement contract that falls within the ambit of the Contract Disputes Act. Pet. Br. 37; see Pet. C.A. Br. 13-14.

A. The Statutory And Regulatory Framework

1. *National Park Service Concessions.* a. More than 85 years ago, Congress created the National Park Service to "promote and regulate the use of Federal areas known as national parks," and charged it with the following "fundamental purpose": "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for future generations."

An Act to Establish a National Park Service (Organic Act), ch. 408, § 1, 39 Stat. 535 (16 U.S.C. 1). So that NPS might fulfill that mandate, Congress empowered the Secretary of the Interior to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks." § 3, 39 Stat. 535 (16 U.S.C. 3). Congress specifically authorized the Secretary to "grant privileges, leases, and permits for the use of land for accommodation of visitors" within the "various parks, monuments, or other reservations" under the Secretary's authority. § 3, 39 Stat. 535.

NPS historically has authorized private concessioners, like those represented by petitioner, to provide visitors with "lodging, food, merchandizing, transportation, outfitting and guiding," and similar services. 65 Fed. Reg. 20,630 (2000); Pet. App. 49a. Concessioners typically have operated their businesses in areas of the national park system[1] pursuant to concession contracts reached with, or permits issued by, NPS. Under those contracts and permits, a concessioner pays NPS a franchise fee—generally a small percentage of its gross revenue—in exchange for the privilege of operating its business in a national park. *Id.* at 4a. Most concessioners provide guide and outfitter services (*e.g.*, river running, fishing, and guide services). Gov't Lodging 7, 9.

b. For many years, concession operations were governed only by NPS internal regulations and policies. Pet. App. 2a. In 1965, Congress enacted the National Park Service Concessions Policy Act (the 1965 Act), Pub. L. No. 89-249, 79 Stat. 969 (16 U.S.C. 20 *et seq.* (1994) (repealed 1998)), and

---

[1] In this brief, the terms "national parks" and "national park system" refer to areas under the administration of the National Park Service. Such areas include national parks, national monuments, national seashores, national battlefields, and national recreation areas. See 16 U.S.C. 1. There are currently 388 units in the national park system.

"put into statutory form" many of NPS's longstanding concessions policies. S. Rep. No. 765, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 591, 89th Cong., 1st Sess. 1 (1965). The 1965 Act authorized the Secretary to "take such action as may be appropriate to encourage and enable * * * concessioners[] to provide and operate facilities which he deems desirable for the accommodation of visitors." 16 U.S.C. 20a (1994). The 1965 Act required NPS to grant existing concessioners a "preference in the renewal of contracts or permits and in the negotiation of new contracts or permits" (16 U.S.C. 20d (1994)), which in practice allowed an existing concessioner to match the terms of any competing proposal. 65 Fed. Reg. at 20,630. Further, although the United States retained legal title to any "structure, fixture, or improvement" built by the concessioner in a national park, the 1965 Act granted concessioners a "possessory interest" in improvements they constructed that would survive the termination of the concession contract. 16 U.S.C. 20e (1994).

c. Over time, sentiment grew that the concession system under the 1965 Act was flawed. See, *e.g.*, George C. Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 Denv. U. L. Rev. 729, 759 (1997). "[A]nti-competitive aspects of the * * * system," particularly "preferential rights [of renewal] and possessory interests," made "service improvement more difficult." *Ibid.*; see 57 Fed. Reg. 40,496, 40,508-40,510 (1992). Following a comprehensive review of NPS concessions, and after notice and comment, the Department of the Interior in 1992 issued regulations governing concession management in the national parks. The regulations clarified the scope of the preference in the renewal of contracts. See 36 C.F.R. 51.3, 51.5(b) (1993). In addition, the regulations made explicit NPS's long-held view that concession contracts "are not federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to

federal procurement actions." 57 Fed. Reg. at 40,503; 36 C.F.R. 51.1 (1993); see 57 Fed. Reg. at 40,498 ("This statement simply clarifies the status of concession contracts, which NPS has never considered a type of federal procurement contract."); Gov't Lodging 2 (Memorandum from David A. Watts, Assistant Solicitor, Parks and Recreation, to Director, NPS (Sept. 24, 1980) ("NPS concession contracts cannot be considered as procurement contracts")).

d. In 1998, after several years of hearings, Congress enacted the National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497. Title IV of that statute (§§ 401-418, 112 Stat. 3503-3517 (16 U.S.C. 5951-5966)), entitled the National Park Service Concessions Management Improvement Act of 1998 (the 1998 Act), repealed the 1965 Act and established "a new, comprehensive concession management program." S. Rep. No. 202, 105th Cong., 2d Sess. 20 (1998). The 1998 Act provides that "the Secretary shall utilize concessions contracts to authorize private entities to provide accommodations, facilities and services to visitors to areas of the National Park System." § 403, 112 Stat. 3504 (16 U.S.C. 5952). The 1998 Act enhances competition for concession contracts by prohibiting the Secretary from extending a preference in contract renewal to existing concessioners in large concession contracts. 16 U.S.C. 5952(7)(A).[2] The 1998 Act further provides that concessioners in new concession contracts have a leasehold surrender interest (rather than a possessory interest) in capital improvements constructed on NPS lands, and provides for the valuation of that interest. See 16 U.S.C. 5954(a)(3) and (4).

---

[2] The 1998 Act authorized the Secretary to continue granting a preference in contract renewal to certain outfitter and guide concessions and to concessions with anticipated annual revenues of less than $500,000. 16 U.S.C. 5952(7)(B) and (8).

In 2000, NPS issued new regulations to implement the 1998 Act. 65 Fed. Reg. at 20,630-20,631; see J.A. 157-162. The new regulations implement the limited renewal preferences and leasehold surrender interest provided by the 1998 Act. See 65 Fed. Reg. at 20,668-20,669. The new regulation slightly revised NPS's earlier regulation regarding the status of concession contracts under federal procurement law. The revised regulation provides that "[c]oncession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act) and are not * * * procurement contracts within the meaning of statutes, regulations, or policies that apply [to] * * * federal procurement actions." 36 C.F.R. 51.3. NPS explained that "[a] procurement contract is a contract under which the government bargains for, pays for, and receives goods or services." 65 Fed. Reg. at 20,635 (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993)); J.A. 164-165. In contrast, "the purpose of concession contracts," as reflected in the language of the 1998 Act, was to "authorize [concessioners] to provide accommodations, facilities and services *to visitors*" and "not to procure goods and services for the government." 65 Fed. Reg. at 20,635 (emphasis added) (quoting 16 U.S.C. 5952); J.A. 164.[3]

[3] Also during 2000, NPS promulgated three versions of its standard concession contract. See 65 Fed. Reg. at 44,894; J.A. 168. So-called "Category I" contracts are generally prescribed for situations in which "the concessioner will be required or allowed to construct or install capital improvements on park area lands," and will be required to perform maintenance on assigned concession facilities. 65 Fed. Reg. at 44,894; J.A. 170. Category I contracts typically are employed for the largest concessions. Category II contracts are prescribed for situations (*e.g.*, gift shops or snack bars) in which the "concessioner will operate on assigned land or in an assigned concession facility, but will not be allowed to construct or install capital improvements." *Ibid.* Category III contracts are prescribed for situations (typically outfitter and guide operations) in which "no lands or buildings are assigned to the concessioner" and "the concessioner will not be allowed to construct or install any capital improvements." *Ibid.* Because some contracts entered into under the 1965 Act are still in force, not all current concession contracts fall into these three categories of contracts. However, NPS expects that the vast majority of concessioners (approximately 78%) will be classified in Categories II and III. See Gov't Lodging 10.

2. *The Contract Disputes Act of 1978.* The Contract Disputes Act of 1978 (CDA), Pub. L. No. 95-563, 92 Stat. 2383 (41 U.S.C. 601 *et seq.*), was enacted as part of a comprehensive process of government procurement reform in the late 1970s and early 1980s. Based on its concerns that "the procurement process is overly complex," unduly costly, and inefficient, and that "the annual expenditures for procurement * * * are so great that even small improvements promise large rewards" (1 *Report of the Commission on Government Procurement* 1 (1972)), Congress established the Commission on Government Procurement in 1969 to conduct a systematic review of government procurement practices. After an exhaustive study, the Commission released a report in 1972 setting forth 149 specific recommendations for improving government procurement. The report served as a blueprint for congressional reform, and "for the next ten to fifteen years, the Commission's findings and recommendations served as the bedrock upon which all major statutory and regulatory changes were based." James F. Nagle, *A History of Government Contracting* 491 (2d ed. 1999). The CDA was one of Congress's legislative responses to the Commission Report.

In the CDA, Congress implemented two of the Commission's central recommendations. First, the Act permits contractors to seek review of an adverse decision of a contracting officer in the United States Court of Federal Claims without first pursuing administrative appeals. 41 U.S.C. 609(a)(1). Second, the CDA allows contractors to recover pre-judgment interest on successful claims. 41

U.S.C. 611. The CDA applies to any express or implied contract entered into by an executive agency for "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property."[4] 41 U.S.C. 602(a).

B. Proceedings In This Case

1. In 2000, petitioner, an association of concessioners that provide services in the national parks, and three of its largest members—Amfac Resorts, L.L.C. (now respondent Xanterra Parks & Resorts L.L.C.), Hamilton Stores, Inc., and ARAMARK Sports and Entertainment Services, Inc.—brought suit in federal district court raising facial challenges to regulations implementing the 1998 Act. They alleged that the regulations were facially arbitrary, capricious, and unlawful for a variety of reasons, including that they (1) failed to recognize concessioners' implied rights of preference in renewal; (2) improperly valued concessioners' leasehold surrender interests; (3) violated the CDA; and (4) granted NPS unlawful authority to review and approve shareholder-level transactions that would result in the transfer or encumbrance of a controlling interest in a concessioner. See Pet. C.A. Br. 13-14. With respect to the CDA claim, petitioner and the other plaintiffs claimed that all concession contracts involve government procurement of services or the procurement of construction, alteration, repair or maintenance of real property within the scope of that Act. See 41 U.S.C. 602(a)(2) and (3). See Pet. C.A. Br. 51.

[4] Although the "disposal of personal property" under Section 602(a)(4) does not involve "procurement," Congress included those contracts, "generally referred to as 'surplus sales' contracts" (S. Rep. No. 1118, 95th Cong., 2d Sess. 18-19 (1978)) to conform the CDA to the scope of then-existing regulations that treated disputes over such sales "in the same manner as procurement disputes." *Ibid.* The CDA's "disposal of personal property" provision is not implicated here. See Pet. Br. 8.

2. The district court granted petitioner summary judgment with respect to one issue relating to the preference in the renewal of contracts, and granted NPS summary judgment on all other issues. Pet. App. 35a-92a; *id.* at 60a. As relevant here, the court rejected the challenge to the NPS regulation stating that concession contracts are not procurement contracts within the meaning of the CDA. *Id.* at 67a. The court held that "concession contracts differ[] markedly" from procurement contracts (*id.* at 68a), noting that, in procurement contracts, the government "usually acts as payor" in an effort "to procure chattel or services for itself." *Id.* at 68a- 69a. By contrast, in concession contracts, NPS acts as "payee" while it "permit[s] another to use its land." *Ibid.* The court concluded from the text of the 1998 Act that Congress understood concession contracts to be "authorization contracts, not procurement contracts." *Id.* at 69a. The court also held that Congress was presumptively aware of "the prevailing understanding * * * that concession contracts were not procurement contracts," and intended to adopt that view when it enacted the 1998 Act without foreclosing that interpretation. *Id.* at 69a-70a.

3. The court of appeals affirmed the district court's holding that NPS concession contracts are not procurement contracts within the meaning of the CDA.[5] Pet. App. 27a-29a. The court reasoned that, unlike procurement contracts, under which "the government bargains for, * * * pays for,

[5] The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. The court reversed the district court's ruling that Xanterra was not entitled to discovery on its claim that it had an implied-in-fact renewal right for the Grand Canyon concession contract. Pet. App. 18a. The court vacated the district court's decision on the merits rejecting the shareholder-approval claim, holding that the claim was unripe. *Id.* at 30a-34a. The court of appeals otherwise affirmed.

and receives goods and services" (*id.* at 27a (quoting 65 Fed. Reg. at 20,635)), concession contracts are undertaken to "authorize third parties to provide services to park area visitors." *Ibid.* The court found support for its conclusion in the language of the 1998 Act (*ibid.* (citing 16 U.S.C. 5952)), the legislative history of the 1998 Act, NPS's prior administrative interpretation, and the Court of Federal Claims's decision in *YRT Services Corp.*, 28 Fed. Cl. at 392 n.23 (holding that NPS concessions "arrangement does not constitute a procurement"). Pet. App. 28a. The fact that the government "receives monetary compensation or incidental benefits from the concessioners'" provision of services to visitors is insufficient to transform the contracts into procurement contracts. *Id.* at 29a.

SUMMARY OF ARGUMENT

The Secretary of the Interior properly exercised her regulatory authority under the Organic Act and the 1998 Act to issue the regulation stating the Department's long-held view that National Park Service concession contracts are not procurement contracts within the meaning of the Contract Disputes Act and other federal procurement laws. Since creating the Park Service in 1916, Congress has recognized that concession contracts are distinct from procurement contracts, and reaffirmed that distinction in enactments both before and after the CDA. The regulation represents the reasoned judgment of the Secretary based on over 85 years of experience both in administering the NPS concessions program *and* in implementing the requirements of federal procurement law within the jurisdiction of the Department of the Interior. The regulation also reflects the distinction Congress traditionally has drawn between NPS concession contracts and procurement contracts, and closely adheres to the meaning of "procurement contract" clearly established by federal procurement law.

The text of the Contract Disputes Act, consistent statutory and regulatory practice, and contemporaneous, closely related statutes all confirm that the meaning of "procurement" within the CDA is limited to the acquisition, *using government funds*, of "supplies or services * * * by and *for the use of the Federal government.*" Ralph C. Nash, Jr. et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 6 (2d ed. 1998) (emphasis added). That was the meaning Congress gave the word in a related provision enacted just eight months before the CDA, in which it defined "procurement contract" to mean an instrument whose "principal purpose" is the acquisition "of property or services for the direct benefit or use of the Federal Government." 41 U.S.C. 503 (Supp. 1979) (recodified as amended at 31 U.S.C. 6303). Petitioner's facial challenge to the regulation must fail, because NPS concession contracts (much less *all* NPS concession contracts) do not satisfy those requirements. They do not involve the expenditure of government funds, and it has long been recognized that the purpose of concession contracts of all sorts, whether for outfitting, food services, or lodging (and whether or not involving ancillary maintenance and construction work to facilitate provision of those services), is to provide services *to visitors* at national parks, *not to the government.* Although petitioner suggests the government is procuring concessioners' services because their provision to visitors furthers NPS's interest in "provid[ing] for the enjoyment of the [parks]" (16 U.S.C. 1), courts have long held that indirectly advancing the statutory mission of an agency by providing services to a third party is not the sort of "direct benefit or use" that brings a contract within the ambit of procurement law. *E.g.*, *Delta S.S. Lines, Inc.* v. *United States*, 3 Cl. Ct. 559, 569 (1983).

The distinct regulatory scheme Congress has created and maintained for NPS concession contracts confirms that they

are not "procurement contracts" under federal law. In authorizing concession contracts, Congress has used language quite distinct from that in procurement statutes (including specific NPS procurement statutes), and regulated the two types of contracts in markedly different ways. Congress specifically exempted NPS concession contracts from general procurement-law advertising and competition requirements in 1928, but had no general exemption for statutes under which NPS itself procured property or services. The 1998 Act maintains the historical distinction between concession contracts authorized for the provision of services to visitors and procurement of goods and services by NPS itself. In the 1998 Act, Congress provided a separate regulatory scheme for the competitive selection of concessioners, while the procurement of services by the Secretary is subject to regulation under ordinary procurement law. That distinctive regulatory scheme reflects the judgment that "concession contracts * * * do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998); accord H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998).

ARGUMENT

THE SECRETARY CORRECTLY DETERMINED THAT CONCESSION CONTRACTS ARE NOT "PROCUREMENT CONTRACTS" UNDER FEDERAL PROCUREMENT LAW

I. THE SECRETARY'S JUDGMENT REGARDING THE NATURE OF CONCESSION CONTRACTS UNDER THE DISTINCT REGULATORY REGIME CREATED BY CONGRESS WARRANTS DEFERENCE

The Secretary acted properly in issuing a regulation setting forth the Department of the Interior's long-held view that National Park Service concession contracts are not

procurement "contracts within the meaning of * * * the Contract Disputes Act" or the other "statutes, regulations, or policies" governing federal procurement. 36 C.F.R. 51.3. That regulation reflects judgments made respecting statutes within the Secretary's regulatory authority—the National Park Service Organic Act, the 1965 Act and the 1998 Act—and concession contracts issued thereunder. Congress has addressed concession contracts repeatedly during the 86-year history of NPS, both before and after passage of the CDA. On each occasion, Congress dealt with concession contracts as a distinct matter, and not as a species of procurement contract. The Secretary's understanding of the distinctive regulatory system that she has overseen for more than eight decades warrants substantial deference.

Based on the Department of the Interior's experience in administering the NPS concessions program, the Secretary determined, first, that "NPS is not paying for the [concessioner's] services but is 'collecting fees in exchange for granting a permit to operate a concession business.'" 65 Fed. Reg. 20,630, 20,635 (2000) (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993)). Second, the Secretary determined that "[t]he purpose of concession contracts is not to procure goods or services for the government," but to "authorize [third parties] to provide accommodations, facilities and services *to visitors* to units of the national park system." 65 Fed. Reg. at 20,635 (quoting 16 U.S.C. 5952) (emphasis added). Based on those determinations, the Secretary concluded that the concession contracts issued under the 1998 Act and the 1965 Act are not properly considered "procurement contracts" for purposes of federal procurement law, including the CDA. That decision was correct.

Congress has vested the Secretary with broad authority to "make and publish such rules and regulations as [she] may deem necessary or proper for the use and management of

the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. 3; see also 16 U.S.C. 5965. The Department issued the regulation at issue in this case after formal notice and comment to embody NPS's consistently held view that concession contracts are not procurement contracts. Cf. *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1270 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'long-standing' duration."); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996). The regulation represents the reasoned judgment of the Secretary based on years of experience both in administering the NPS concessions program *and* in implementing the requirements of federal procurement law with respect to procurement contracts within the jurisdiction of the Department of the Interior. As discussed below, not only does the Secretary's view reflect the distinction Congress traditionally has drawn between NPS concession contracts and procurement contracts, it also closely adheres to the meaning of "procurement contract" clearly established by federal procurement law. Cf. *NISH* v. *Cohen*, 247 F.3d 197, 203 n.5 (4th Cir. 2001) (although Department of Education, not Department of Defense, had interpretive authority over relevant statute, "DOD's role in implementation of the [statute] is primarily to follow the decisions of [the Department of Education]"). "[T]he well reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance." *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998). Such views warrant "serious consideration" because of the agency's "unique advantage" stemming from its "its day-to-day efforts to implement its statutory mission." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002).

The Secretary's views are also entitled to deference because her practical experience with NPS concession contracts puts her in a unique position to determine whether they generally meet the requirements for procurement contracts, and specifically, whether, given the mission of NPS, they involve the procurement of services *for the government*. These are matters within the particular expertise of the agency. As noted in the context of the Federal Grant and Cooperative Agreements Act, "[t]he mission of the agency will influence the agency's determination" of whether a transaction constitutes "procurement" or not. S. Rep. No. 449, 95th Cong., 1st. Sess. 20 (1977). Agencies "have the flexibility of determining whether a given transaction or class of transactions is procurement," and "the agency's classification of its transactions will become a public statement for public, recipient, and congressional review of how the agency views its mission, its responsibilities, and its relationships with the non-federal sector." *Ibid.*; accord 3 *Report of the Commission on Government Procurement* 165-166 (1972) (*Commission Report*).[6]

[6] Respondent Xanterra contends that, because Congress did not charge NPS with interpretive authority over the CDA, its regulation is "ultra vires" and void even if reasonable. Xan. Br. 10-19; see also Pet. Br. 11 n.2. That argument is without merit. In the first place, NPS was not directly interpreting the CDA, but rather determining how the special concession statutes it is charged with interpreting interact with the more general provisions of the CDA. In any event, it is well established that agencies may issue interpretive rules "to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Such rules provide the public notice of the agency's interpretation of "the meaning and requirements of the statute" (*United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973)), inform contractors of the Department's view of the implications of procurement law on programs within its jurisdiction to assist their long-term planning, and inform NPS employees of the procedures to be followed. Although Xanterra faults the court of appeals (Xan. Br. 13-15) for failing to recognize that an "agency's power to promulgate legislative regulations is limited to the authority delegated by

II. NATIONAL PARK SERVICE CONCESSION CONTRACTS ARE NOT PROCUREMENT CONTRACTS UNDER FEDERAL PROCUREMENT LAW, INCLUDING THE CONTRACT DISPUTES ACT

A. The Text And History Of The Contract Disputes Act Demonstrate That It Applies Only To Contracts Involving The Use Of A Government Entity's Funds To Acquire Goods Or Services For Government Use

It is axiomatic that the CDA does not apply to all government contracts. *G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992). By its own terms, the application of the CDA is "limited" (*ibid.*) to contracts "entered into by an executive agency for—(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. 602(a). Petitioner contends that NPS uses concession contracts to procure "services" and "construction, alteration, repair or maintenance of real property." Pet. Br. 8.

Although the CDA does not define the word "procurement," the word derives a particular meaning as a term of art from the text of the CDA, the historical use of the word

---

Congress" (Xan. Br. 12), the court of appeals did not treat Section 51.3 as a legislative regulation, and did not purport to grant the regulation deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984). The court simply *agreed* with the Secretary's conclusion. See Pet. App. 27a-29a. The cases cited by Xanterra do not suggest the court of appeals' decision was erroneous, because all involve legislative regulations claimed to have the force of law. See *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990); *Motion Picture Ass'n of Am., Inc.* v. *FCC*, 309 F.3d 796, 801-802 (D.C. Cir. 2002); *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *Kelley* v. *EPA*, 15 F.3d 1100, 1108-1109 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

"procurement" in the context of government contracting, and its use in related statutory and regulatory provisions. Those interpretive tools make clear that a procurement contract involves the procurement of property or services using government funds by and for the direct use of the government.

1. *The Language Of The Contract Disputes Act Indicates That It Applies Only To Transactions Involving The Procurement Of Property Or Services By And For The Federal Government Using Government Funds*

a. In the context of government contracting, the term "procurement contract"[7] applies only to contracts involving the expenditure of a government entity's funds to acquire property or services for the use of the federal government. See generally *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 372 (1986) (following "the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply"). The most comprehensive dictionary on government contracting specifically defines the term "acquisition" (and the "synonymous term procurement") as "[a]cquiring by contract, *with appropriated funds*, supplies or services (including construction) *by and*

---

[7] Petitioner contends that the CDA's reference to a "contract * * * for * * * procurement" is not equivalent to a "procurement contract" because "[t]he word 'procurement' appears in the CDA as a noun, rather than as an adjective describing and limiting the types of contracts entitled to the protection of the statute." Pet. Br. 12. The proposed distinction is illusory. While "procurement" appears in the CDA as a noun, that noun is part of the *adjectival* prepositional phrase "for * * * procurement," modifying the noun "contract." See generally William A. Sabin, *The Gregg Reference Manual* 558 (9th ed. 2001) (noting that a prepositional phrase "may be used as * * * an adjective"). Thus, the terms have identical meaning. Cf. *United States* v. *Poff*, 926 F.2d 588, 591 (7th Cir.) (en banc) (declining to "tease meaning from [a provision's] use of a prepositional phrase rather than an adjective"), cert. denied, 502 U.S. 827 (1991).

for the use of the Federal government." Ralph C. Nash et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 6 (2d ed. 1998) (emphasis added). That is the meaning Congress adopted when it amended a related procurement law in 1996. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304(a), 110 Stat. 659 (defining "Federal agency procurement" to "mean[] the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds") (41 U.S.C. 423(f)(4)).

Petitioner argues that the words "procurement" and "contract" each should be read in isolation, rather than in the context of their use in the phrase "contract * * * for * * * procurement" (41 U.S.C. 602(a)) or "procurement contract." Pet. Br. 12. But "it is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno* v. *Koray*, 515 U.S. 50, 56 (1995); accord *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). While "procurement" alone means "[t]he act of obtaining, attainment, acquisition" (*Black's Law Dictionary* 1087 (5th ed. 1979)), and "contract" alone means "[a]n agreement * * * which creates an obligation to do or not to do a particular thing" (*id.* at 292-293), the two words together have a far more specific meaning. "Procurement contract" is "[a] government contract with a manufacturer or supplier of goods * * * or services under the terms of which a *sale* is made to the government." *Id.* at 1087 (emphasis added).

That "contract[s] * * * for * * * procurement" (41 U.S.C. 602(a)) are limited to contracts involving payment by the government is confirmed by the text of the CDA itself. The CDA provides for payment of monetary awards in favor

of a contractor out of the Judgment Fund, and in turn provides for the reimbursement to the fund "by the agency *whose appropriations were used for the contract.*" 41 U.S.C. 612(c) (emphasis added). The clear implication is that only contracts involving the payment of government funds constitute "procurement."

b. When determining the meaning of undefined terms in the CDA, courts have "look[ed] for guidance to its implementing regulations," *i.e.*, the Federal Acquisition Regulation (FAR), 48 C.F.R. Ch. 1. *H.L. Smith, Inc.* v. *Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995); *Essex Electro Eng'rs, Inc.* v. *United States*, 960 F.2d 1576, 1577, 1580-1581 (Fed. Cir.), cert. denied, 506 U.S. 953 (1992). See generally *Reflectone, Inc.* v. *Dalton*, 60 F.3d 1572, 1579 n.11 (Fed. Cir. 1995) (en banc) (Office of Federal Procurement Policy "ha[s] authority to issue regulations implementing the CDA"). The FAR explicitly defines "procurement" (by cross-reference to "acquisition") as "acquiring by contract *with appropriated funds* of supplies or services * * * *by and for the use of the Federal Government* through purchase or lease." 48 C.F.R. 2.101 (emphasis added). Similarly, "contract" is defined as "a mutually binding legal relationship obligating the seller to furnish the supplies or services * * * and the buyer *to pay for them.*" *Ibid.* (emphasis added); accord *Government Contracts Reference Book* 409 (defining "procurement contract" as "those instruments governed by the Federal Acquisition Regulation").[8]

---

[8] Tellingly, the 3785-page FAR, which regulates with "oftentimes astonishing specificity[] how the entire contracting process will be conducted" (*Board of Comm'rs* v. *Umbehr*, 518 U.S. 668, 691 (1996) (Scalia, J., dissenting)), mentions concessions only *twice*. 48 C.F.R. 7.503(c)(17)(i) (excluding from the category of "inherently governmental functions" not to be performed by contractors the "[c]ollection of fees * * * from visitors to * * * concessions [and] national parks"); 48 C.F.R.

Petitioner does not seem to dispute that this is the meaning of "procurement" that prevails in other areas of procurement law (see *e.g.*, Pet. Br. 27; Pet. 12 n.2, 15 n.4), but simply contends that a different definition should be applied solely for purposes of the CDA. Far from "mak[ing] government procurement policy *consistent*" (Pet. Br. 11 n.2), the novel definition of "procurement" petitioner proposes would transform NPS concessioners into procurement contractors under the CDA without rendering them subject to *any other* government procurement law. That position is untenable.

2. ***Consistent Statutory And Regulatory Practice Confirms That The Contract Disputes Act Applies Only To Contracts Involving The Procurement Of Property Or Services By And For The Federal Government Using Government Funds***

The prevailing definition of "procurement contract" used in the context of government contracting took shape through more than half a century of statutory and regulatory practice. In that context, the term "procurement" consistently has meant the acquisition of personal property or nonpersonal services *using government funds* (typically, appropriated funds) by and *for the use of a federal agency*.

a. *Postwar Procurement Acts.* After the explosion of government procurement during World War II, Congress enacted the Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (10 U.S.C. 2302 *et seq.*), as a "comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments." S. Rep. No. 571, 80th Cong., 1st Sess. 2 (1947). In that Act, Congress limited the scope of procurement to "purchases and contracts of supplies and services

25.601(a)(3)(i)(F) (prohibiting agencies from awarding service contracts for "[a]irport concessions" to countries subject to trade sanctions).

* * * *for the use of any such agency*" and "*to be paid for from appropriated funds.*"[9] § 2(a), 62 Stat. 21 (10 U.S.C. 2303(a)) (emphasis added). Two years later, Congress revised the civilian agency procurement regime by enacting the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (41 U.S.C. 251 *et seq.*) which "follow[ed] in structure," and generally was "identical in language with, the Armed Services Procurement Act." H.R. Rep. No. 670, 81st Cong., 1st Sess. 20 (1949); see Pub. L. No. 81-152, § 302(a), 63 Stat. 393 (41 U.S.C. 252(a) and (b)) (providing for procurement "of property and services for the Government"). The first comprehensive regulations implementing those statutes likewise indicated that a "procurement contract" was an agreement for the acquisition of property or services with government funds by and for government use. See 10 C.F.R. 851.102 (1948) (limiting application to "purchases and contracts made * * * for the procurement of supplies or services which obligate appropriated funds"); 41 C.F.R. 1-1.208 (1959) (defining "contract" to mean a "binding legal relation basically obligating the seller to furnish personal property or nonpersonal services * * * and the buyer to pay therefor" and included "commitments which obligate the Government to an expenditure of funds"). Those regulations were still in force when Congress was considering the CDA. See 32 C.F.R. 1-102 (1978); 41 C.F.R. 1-1.208 (1978).

b. *Commission on Government Procurement.* The specific meaning of the term "procurement" was thus well understood by the time Congress created the Commission on

[9] Although the statute covers purchases "for the use of any [specified] agency *or otherwise*," that language simply "ma[de] the [statute's] coverage complete for supplies or services to be paid for from appropriated funds" by encompassing "one agency purchasing, or making contracts for, the use of other agencies." S. Rep. No. 571, *supra*, at 5-6.

Government Procurement in 1969, and the Act creating the Commission clearly reflected that understanding. The declared purpose of Congress in creating the Commission was "to promote economy, efficiency, and effectiveness in the procurement of goods, services and facilities *by and for the executive branch of the Federal Government*" by establishing policies that would "require the Government to acquire goods, services, and facilities * * * *at the lowest reasonable cost*." Act of Nov. 26, 1969, Pub. L. No. 91-129, § 1, 83 Stat. 269) (emphasis added). The Report of the Commission on Government Procurement issued in 1972 likewise reflected that "the basic purpose[]" of procurement was "the obtaining of goods and services *for Government use*" and involved "a basic arms-length buyer-seller relationship" under which "the Government's role is * * * of a purchaser." (3 *Commission Report* 162 (emphasis added)); *id.* at 167, table 1 (purpose of procurement is "[p]urchase of product or service for Federal use").

Although petitioner contends that the government "procures" services when it enters into agreements under which third parties perform services (Pet. Br. 19-25) to advance the government's interest in "provid[ing] for the enjoyment of the [parks]" (Pet. Br. 33 (quoting 16 U.S.C. 1) (emphasis omitted)), that was not the Commission's understanding of the meaning of procurement. The Commission explicitly distinguished procurement from other arrangements under which the government provided funding to third parties that were "endeavoring to accomplish congressionally established objectives" with federal assistance (3 *Commission Report* 171) and concluded that such arrangements should not be described as "procurement." *Id.* at 162. It is therefore unsurprising that, although some NPS concession contracts issued at the time of the Commission study required concessioners to undertake millions of dollars of construction activity, to perform maintenance on structures they operated, and to provide services to park visitors,[10] the exhaustive four-volume, 800-page Commission Report made *no mention* of NPS concessions and never cited the Organic Act or the 1965 Act governing NPS concessions. Indeed, the word "concession" does not even appear in its index. See *Commission Report* Index-Bibliography-Acronyms 1-10, 27-33.

c. *Post-Commission Reforms.* Although petitioner correctly notes that "Congress took the Commission's advice to heart" in passing the Contract Disputes Act of 1978 (Pet. Br. 18), that statute was only one of the enactments that arose from the Commission Report. The other legislative enactments that preceded the CDA unequivocally indicate that Congress understood "procurement" to mean the acquisition of property or services *using government funds* by and *for the use of federal agencies.*

Congress's first step after receiving the Commission Report was the enactment of the Office of Federal Procurement Policy Act of 1974 (OFPP Act), Pub. L. No. 93-400, 88 Stat. 796 (41 U.S.C. 403 *et seq.*), which created the OFPP and charged it with the task of "establishing a system of coordinated, * * * uniform procurement regulations" for the entire executive branch. § 6(d)(1), 88 Stat. 797. In defining the principal scope of the procurement activities that OFPP would supervise, Congress used language

---

[10] See Lodging by Respondent Xanterra Parks & Resorts, L.L.C. at 328-330, 345-346 (1969 contract for Grand Canyon National Park requiring concessioner to "undertake an improvement and building program of not less than $5,000,000"); *id.* at 332 (requiring concessioner to "provide all necessary maintenance and repairs"); *id.* at 342 (requiring concessioner to carry insurance); *id.* at 361-363 (1970 contract for Yellowstone National Park requiring concessioner to "undertake an improvement and building program of not less than $1,735,000"); *id.* at 365 (concessioner must "maintain and operate [specified] accommodations"); *id.* at 367 (requiring concessioner to "provide all necessary maintenance and repairs").

BEST AVAILABLE COPY

strikingly similar to that used four years later in describing the scope of the CDA: OFPP was responsible for setting policy to be "followed by executive agencies in the procurement of—(A) property other than real property in being; (B) services * * * ; and (C) construction, alteration, repair, or maintenance of real property." § 6(a), 88 Stat. 797 (41 U.S.C. 405(a)). Congress reiterated its understanding of the meaning of "procurement" by stating its goal was to promote "economy, efficiency, and effectiveness of procurement *by and for the executive branch of the Federal government.*" § 2, 88 Stat. 796 (41 U.S.C. 401 (Supp. 1979)) (emphasis added). Even more significantly, in addition to regulatory authority over "executive agenc[y] * * * procurement" (§ 6(a), 88 Stat. 797), Congress *separately* gave OFPP authority to regulate "executive agencies * * * *providing for* procurement by recipients of federal grants or assistance * * * to the extent required for the performance of federal grant or assistance programs." *Ibid.* (41 U.S.C. 405(i)(1)). By providing that separate authority, Congress clearly indicated that "executive agency * * * procurement" (the same phrase used in the CDA, see 41 U.S.C. 602(a)) does not itself encompass acquisition of goods or services by third parties under the direction of federal agencies, even if the acquisition is "required for the performance" of a federal program. § 6(a), 88 Stat. 797.[11]

[11] Congress initially limited OFPP's oversight authority to "procurement payable from appropriated funds" (§ 6(c), 88 Stat. 797), but directed OFPP to conduct a study of "procurement payable using nonappropriated funds." *Ibid.* After OFPP delivered the study to Congress in late 1976, Congress eliminated the provision limiting OFPP's jurisdiction to procurement using appropriated funds. See Pub. L. No. 96-83, § 4, 93 Stat. 649 (1979). The study focused on acquisition using the non-appropriated funds *of government groups* known as non-appropriated fund instrumentalities (NAFIs). Conspicuous by its absence from the 400-page "detailed examination of nonappropriated fund * * * procurement" (Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable From Nonappropriated Funds* 1 (1976) (*Procurement Study*)) was *any mention* of NPS concessions activities requiring millions of dollars of construction activity, maintenance work, and other services. See note 10, *supra*; see *Procurement Study* 337-338 (discussing non-appropriated fund procurement by Department of the Interior).

Just eight months before enacting the CDA, Congress took up another of the Commission's recommendations by enacting the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), Pub. L. No. 95-224, 92 Stat. 3, which described the "type of basic relationship" Congress "expected between the Federal government and non-federal parties." S. Rep. No. 449, 95th Cong., 1st Sess. 2 (1977). The FGCAA, which originally was codified in the United States Code alongside the CDA, see 41 U.S.C. 501-509 (Supp. 1979) (recodified at 31 U.S.C. 6301-6308), provided that, ordinarily, an executive agency "shall use a * * * procurement contract" in dealing with a nonfederal party "whenever the *principal purpose* of the instrument is the acquisition, by purchase, lease, or barter, of property or services *for the direct benefit or use of the Federal Government.*" 41 U.S.C. 503 (Supp. 1979) (emphasis added) (recodified as amended at 31 U.S.C. 6303). If the principal purpose was "to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition * * * for the direct benefit and use of the Federal Government," ordinarily the agency would use a "grant agreement" or "cooperative agreement." 41 U.S.C. 504, 505 (Supp. 1979) (recodified as amended at 31 U.S.C. 6304, 6305).

d. *The Contract Disputes Act of 1978.* Thus, when Congress enacted the CDA in the Fall of 1978, the meaning of the term "procurement contract" was well established by existing statutes and regulations governing federal procurement. Although the CDA did not explicitly define the

phrase "contract * * * for * * * procurement" (41 U.S.C. 602(a)), Congress presumably meant to adopt the meaning used elsewhere in federal procurement law: contracts for the procurement of property or services by and *for the use of the federal government* through *the expenditure of a government entity's funds*. "[A] legislative body generally uses a particular word with a consistent meaning in a given context" and it is generally presumed that "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972); cf. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992). It is particularly likely that Congress used the term "procurement" consistently in the OFPP Act, the FGCAA, and the CDA, because the laws were enacted in the space of only a few years as part of a systematic effort at procurement reform. Cf. *Erlenbaugh*, 409 U.S. at 244 (application of the rule of *in pari materia* "certainly makes the most sense when the statutes were enacted by the same legislative body at the same time").

Petitioner errs in contending (Pet. Br. 13-16) that because the CDA only exempted certain types of procurement contracts from its coverage, the CDA should be applied expansively to "almost the entire gamut of government contracts." Pet. Br. 13. While Congress evidently intended to have a single dispute regime for government-wide procurement, it also clearly "intend[ed] to cover" only "*ordinary* procurement * * * contracts." 124 Cong. Rec. 36,267 (1978) (statement of Sen. Byrd) (emphasis added); see also *id.* at 36,264 (statement of Sen. Baker) (excluding certain types of Tennessee Valley Authority contracts because they were not "typical Federal procurement" contracts). Moreover, in light of Congress's passage of specific legislation regulating concession contracts in 1965, it is unclear why those contracts would be presumed to be governed by the more general provisions of the CDA, when Congress never

indicated in the CDA that they would apply and the NPS contracts do not share the basic characteristics of procurement contracts. Petitioner's reliance on the committee reports' general discussion of the CDA's intended "broad application" (Pet. Br. 9-10, 18 (quoting S. Rep. No. 1118, 95th Cong., 2d Sess. 17 (1978)) is misplaced, given that, after those reports were issued, Congress amended the legislation to delete a provision that would have expanded its scope to "any * * * contract or agreement with the United States" which included a provision expressly making the contract "subject to [the CDA's] provisions." S. Rep. No. 1118, *supra*, at 17; H.R. Rep. No. 1556, 95th Cong., 2d Sess. 16 (1978). See Robert T. Peacock, *A Complete Guide to the Contract Disputes Act* 13 (1986).

B. National Park Service Concession Contracts Do Not Come Within The Scope Of The Contract Disputes Act

Thus, to qualify as a "procurement contract," an agreement must (1) provide for the acquisition of personal property or nonpersonal services by and for the direct use and benefit of the federal government; and (2) obligate payment using government funds. Far from being "[i]nsubstantial" (Pet. Br. 26), "whimsical" (*id.* at 29), "formalistic" (*id.* at 28; Xan. Br. 25), or "flimsy" (Xan. Br. 28) distinctions, those requirements arise from the text of the CDA, closely related procurement provisions, and consistent regulatory interpretation. See *G.E. Boggs*, 969 F.2d at 1027 (CDA did not cover contract in which contractor and agency did not have a "relationship * * * of a buyer and a seller"); *Institut Pasteur* v. *United States*, 814 F.2d 624, 627-628 (Fed. Cir. 1987) (CDA did not cover contract in which there was no "buyer-seller relationship" and there was "no obligation on the part of the Government to expend funds"); *Bailey* v. *United States*, 46 Fed. Cl. 187, 211 (2000) (CDA did not cover contract, based in part on fact that "appropriated funds

[were not] to be utilized" under it); *Ervin & Assocs., Inc.* v. *United States*, 44 Fed. Cl. 646, 654 (1999) (noting that "the expenditure of government funds" is a "hallmark[] of a CDA contract").

1. National Park Service concession contracts do not meet those requirements. To begin with, they do not involve the expenditure of government funds: It is undisputed that concessioners *pay the government* for the privilege of operating concessions in national parks.[12] Pet. App. 27a; *id.* at 69a. Petitioner cannot evade the fact that money flows in the opposite direction than under procurement contracts by analogizing concession contracts to the barter arrangements some courts have held to be procurement contracts. See Pet. Br. 28-29. While barter transactions do not require the payment of government funds, they nevertheless do require the government to pay for services through the in-kind exchange of services or "specific property susceptible of valuation." *Institut Pasteur*, 814 F.2d at 628 (quoting *Black's Law Dictionary* 1200 (5th ed. 1979)). But while concessioners

[12] To be sure, as Xanterra notes (Xan. Br. 26), if a concessioner with a leasehold surrender interest (LSI) in capital improvements ceases providing concession services at a park, and the government is unable to locate a new concessioner to pay the old concessioner the value of the LSI on a timely basis, the government must ensure that the concessioner is reimbursed the value of the LSI. However, those circumstances arise quite infrequently. The fact that, in rare cases, a concessioner will receive a payment from the government (as is *always* the case under procurement contracts) does not alter the reality that the money in concession contracts generally flows in the opposite direction, and does not assist petitioner in this facial challenge. Moreover, because reimbursing the LSI interest to a departing concessioner based on that contingency is not the purpose of entering a concession contract, it cannot be said that a contractual provision providing for such a payment renders the entire agreement a procurement contract for property. See *G.E. Boggs*, 969 F.2d at 1027 n.* (CDA does not cover acquisition of property that is "only incidental to, and not the purpose of those agreements").

provide property or services *to park visitors* under concession contracts, the government provides neither property nor services in exchange, only "access to government-owned properties and the opportunity to earn a profit" (Pet. Br. 28)—in other words, a license or permit. See *Black's Law Dictionary* 829 (5th ed. 1979). But the government's interest in a license before its issuance is not property, but rather a "purely regulatory" interest. *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000). That is certainly true here, where Congress specifically adopted the current concession scheme to prevent "unregulated and indiscriminate use" (16 U.S.C. 5951(a)) and requires the Secretary to emphasize interests in "protecting, conserving and preserving [park] resources" in selecting concessioners. 16 U.S.C. 5952(5).[13]

2. Furthermore, NPS concession contracts are not procurement contracts because they do not involve the procurement of services by and for the government. It has long been observed that "contracts made with [concession] operators in the national parks are made not for the service to be furnished to the Government but for service to be furnished to the public who go to the parks." 69 Cong. Rec. 3710 (1928) (statement of Rep. Cramton). Because concession contracts

[13] The inclusion of barter transactions within the scope of "procurement" is intended to prevent the ready circumvention through in-kind exchange of procurement laws designed to protect the public fisc—not, as petitioner contends, to sweep into the federal procurement regime every contract under which a private party receives consideration of *any* sort (whether or not property or services, see Pet. Br. 28) in exchange for property or services. The cases cited by petitioner, which involve the in-kind exchange of one readily valued agricultural commodity for another (or in exchange for debt retirement) are inapposite. See *Bartlett & Co. Grain*, No. 86-187-1, 1990 WL 166521 (ASBCA Oct. 18, 1990); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986). Petitioner cites no authority for the strained assertion that a government's issuance of a license in exchange for the provision of services to third parties constitutes "barter."

are not for the "principal purpose" of providing goods and services "for the direct benefit or use" of the National Park Service (31 U.S.C. 6303), they are not "procurement contracts" under federal procurement law. See *YRT Servs. Corp.*, 28 Fed. Cl. at 392 n.23 (NPS concession contract "does not constitute a procurement").[14]

[14] The cases cited by the petitioner (Pet. Br. 25-26, 30) and Xanterra (Xan. Br. 4-5, 27) are not to the contrary. The government itself paid for the services performed in both *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 559 (Ct. Cl. 1978) (government paid for shuttle bus to encourage use of mass transit), and *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997). See 32 C.F.R. 199.1(e) (government to finance medical care using "appropriated funds furnished by the Congress"). And as the Federal Circuit noted in *Total Medical*, the United States also had an enforceable "legal obligation[]" (104 F.3d at 1320) to provide health care to military dependents, making the contract one "for the use of" the United States in providing benefits to its employees. See 10 U.S.C. 1076(a)(1) (stating that "[a] dependent * * * is entitled * * * to the medical and dental care" prescribed by Title 10). Nor are the Armed Service Board of Contract Appeals cases cited by petitioner (see Pet. Br. 25-26 nn.14-18) persuasive authority to the contrary. In only one of the cases was the issue of CDA coverage actually litigated and resolved by the board. See *Hernandez*, No. 53,011, 2000 WL 1844742, at *1 (ASBCA Dec. 12, 2000). There, the ASBCA held the CDA covered an individual's agreement with the Defense Commissary Agency to work as a grocery bagger at one of the agency's grocery commissaries. See *id.* at *8-9. However, the court noted that the "primary function" of the contract was to provide services *to the commissary* (see *id.* at *1-2; *id.* at *8), which was a government-created entity whose primary customers were federal employees and their dependents, not members of the general public as in this case. Likewise, in *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996), the applicability of the CDA was not contested. Moreover, the *Pound* court's basis for acquiescing in a claim of CDA jurisdiction was based *not* a "procurement," but on a "disposal of personal property" under 41 U.S.C. 602(a)(4). See *Pound*, slip op. 10 n.2; Pet. App. 99a. Petitioner has not asserted that as a basis for CDA coverage. See Pet. Br. 8.

Although petitioner emphasizes the variety of services concessioners perform under the largest concession contracts (Pet. 22-23), it offers no satisfactory explanation of how the government receives "direct * * * use" (31 U.S.C. 6303) of those services.

Outfitting. Petitioner errs in contending that concession contracts "usually * * * involve the procurement of work related to government-owned facilities." Pet. Br. 8. In fact, most of the approximately 600 NPS concession contracts simply involve the provision of guide or outfitter services (for example, river rafting services).[15] Such operations typically do not use facilities within the park (*id.* at 23 n.10), are responsible for no maintenance, usually both pick up and drop off their customers outside park boundaries, and only use the park as a place to ply their trade. See, *e.g.*, *Concessions Reform: Hearings Before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 141 (1993) (statement of David Brown). Park visitors receive "direct * * * use" of such outfitters' services (31 U.S.C. 6303), and any use or benefit the government receives is ancillary to that. *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 103d Cong., 1st

[15] Petitioner and Xanterra likewise err in claiming that the Grand Canyon and Yellowstone contracts, which involve the operation of numerous hotels and other facilities, are "typical" of NPS concession contracts. Pet. Br. 20 & n.8; Xan. Br. 23. In fact, each of the concession contracts specifically discussed by petitioner (Pet. Br. 20 n.8)—for the South Rim of the Grand Canyon, Yellowstone National Park, and Antelope Point in Glen Canyon National Park—is among the small handful of the largest NPS concession contracts. Most concession contracts involve the provision of far fewer services on a much smaller scale. See generally Gov't Lodging 6.

Sess. 44 (1993) ("the customer, in the case of the national parks, [is] the visitor") (statement of J. Richard Hill).

Food, Merchandise, Lodging. Although food and merchandise sales and the provision of lodging typically involve the use of park buildings, the "primary purpose" of concession contracts for those services is the provision of services directly to park visitors at visitor expense. Although concessioners typically are required to maintain the facilities they use, that is secondary to the main purpose of providing service to visitors. Commercial leases typically are subject to similar maintenance requirements, and those are not ordinarily considered to be contracts for maintenance services to the lessor.[16] Cf. *Abernethy* v. *Cates*, 356 S.E.2d 62, 63 (Ga. Ct. App. 1987) (commercial lease provided that tenants were "responsible for maintaining and repairing the leased premises").

Construction of facilities. Petitioner also argues that because some concessioners build or renovate property, the government is procuring construction under those concession contracts. Pet. Br. 23. Since the beginning of the national park system, however, many concessioners have been responsible for building their own facilities, see, *e.g.*,

[16] The cases cited by Petitioner (Pet. Br. 36) are inapposite. All involved the expenditure of government funds to maintain a building operated by a government entity, rather than a private lessee as here. See *Grunley Constr. Co.*, No. 6327, 1998 WL 835156 (Army Corps Eng'rs BCA Nov. 20, 1998) (Kennedy Center for the Perfoming Arts, a unit of the Smithsonian Institution); *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997) (Cooper-Hewitt Museum, a unit of the Smithsonian Institution), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (Table); *Libra Eng'g Inc.*, No. 1182-17, 1984 WL 13526 (NASABCA July 13, 1984) (Freer Gallery, a unit of the Smithsonian Institution); *J&J Maint., Inc.*, No. 59,984, 2000 WL 199758 (ASBCA Feb. 15, 2000) (military installations). See generally 20 U.S.C. 41 (establishing Smithsonian Institution); 20 U.S.C. 53a (authorizing appropriation of funds for maintenance and repair of buildings).

H.R. Rep. No. 591, 89th Cong., 1st Sess. 7 (1965) (statement of Stewart L. Udall, Secretary of the Interior), and yet historically, it has been recognized that such services were not "to be furnished to the Government but * * * to the public who go to the parks." 69 Cong. Rec. at 3710 (statement of Rep. Cramton) (discussing private developments at Mount Rainier National Park). That is because such buildings are built not for the "principal purpose" (31 U.S.C. 6303) of providing a building for the direct use of a government agency, but because buildings are necessary for concessioners to provide certain facilities to park visitors. Although, as petitioner notes (Pet. Br. 23), the government maintains legal title to improvements—because neither the Organic Act nor the 1998 Act empower the Park Service to cede land to concessioners in national parks—successive concessioners who acquire a leasehold surrender interest in a building retain a compensatory interest in it equal to its depreciated construction cost.

Even if petitioner were correct that some subset of concession contracts were properly considered a procurement of services, petitioner's "facial challenge[]" (Pet. C.A. Br. 13-14) to 36 C.F.R. 51.3 still must fail. Petitioner and respondent Xanterra do not challenge a particular application of the regulation. "To prevail in such a facial challenge," petitioner "must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)); accord *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid as applied * * * does not mean the regulation is facially invalid because it is without statutory authority."). Petitioner has not made—and cannot make—the showing that "*every* NPS concessions contract" is a procurement contract. Pet. Br. 37. Most of the approximately 600 NPS concession contracts require neither

construction nor upkeep of government-owned facilities; most require only that the concessioner operate for the term of the agreement.[17] Some do not require concessioners to provide services, but merely *permit* them to do so. For example, one typical concession contract provides as follows: "Required Services: None. Authorized Services: Sport hunting guide services within [specified] portion of Denali National Preserve." See Gov't Lodging 16 (Concession Contract No. CC-DENA904-02). Many concession permits issued under the 1965 Act (which come within the NPS definition of "concession contracts," see 65 Fed. Reg. at 20,635; J.A. 167) likewise do not require the provision of services. See Gov't Lodging 52 (NPS concession permit No. LP-WRST-016-98, for outfitter services in Wrangell-St. Elias National Park and Preserve). And as Xanterra evidently acknowledges (Xan. Br. 22-23), contracts and permits that do not require the provision of services are not procurement contracts, even under the expansive definition of the term it advocates. See *Crystal Cruises, Inc.*, No. B-238, 1990 WL 277630, at *1 (Feb. 1, 1990) (concession permit for cruise-ship entry into park "is not a procurement of property or services") aff'd on reconsideration, 1990 WL 278100 (Comp. Gen. June 14, 1990).

Although petitioner suggests that concessioners' provision of services to park visitors constitutes a procurement because it furthers NPS's interest in "provid[ing] for the enjoyment of the [parks]" (Pet. Br. 33 (quoting 16 U.S.C. 1) (emphasis omitted)), furthering the statutory mission of an agency by permitting a third party's provision of services to the public is not the sort of "direct benefit or use" (31 U.S.C. 6303) required under procurement law. Just a few years

[17] See, *e.g.*, Gov't Lodging 61 (NPS concession permit CP-OZAR025-97 allows rental of up to 60 canoes and 150 inner tubes on the Ozark National Scenic Riverways; no maintenance required).

after the passage of the CDA, the Claims Court rejected a similar argument in a case involving the provision of subsidies for U.S.-built and -flagged ships, which took place under a program based on a congressional finding that the existence of such ships was "necessary for the national defense" for use during national emergencies. As the court noted in rejecting the claim, Congress intended the CDA to cover only "*the conventional contract for the direct procurement of property, services and construction, to be used directly by the Government.*" *Delta S.S. Lines, Inc.* v. *United States*, 3 Cl. Ct. 559, 569 (1983) (emphasis added); *Blanco-Mora Enters., Inc.*, No. 94-5-136-C5, 1994 WL 248163, at *10 (HUDBCA June 10, 1994) (agreement under which landlord made housing available at reduced rents to low-income tenants in exchange for federal mortgage insurance, and agreement to pay rent subsidies to landlords for tenants, not covered by CDA; "improved availability of housing" for the poor "is, at most, an indirect benefit" to HUD) (collecting authorities); see generally *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989).[18] If petitioner were correct that the acquisition of

[18] Petitioner cites Congress's provision for CDA review for the Long-Term Care Security Act of 2000 as an indication that the "CDA applies to contracts that are not for the direct benefit of the government." Pet. Br. 30. However, Congress is free to provide for CDA coverage of new categories of contracts by specific legislation. Indeed, Congress's explicit discussion of the CDA in the Act may be an indication of doubt that the CDA would have applied of its own terms. Cf. Pub. L. No. 100-472, Tit. II, § 206, 102 Stat. 2294 (1988) (adding provision stating that "[t]he Contract Disputes Act * * * shall apply to self-determination contracts"); see S. Rep. No. 274, 100th Cong., 2d Sess. 34-35 & n.26 (1988) (noting that amendment was designed to overrule court decision holding that such contracts were not covered by CDA). In any event, the Long-Term Care Security Act expressly provides a benefit (insurance) to government employees and their dependents, and in that regard provides employee welfare services akin to those traditionally covered by the CDA.

property or services by third parties that generally furthers federal objectives constitutes "executive agency * * * procurement" (41 U.S.C. 602(a)), it would drastically expand the scope of federal procurement law.[19]

3. The Interior Board of Contract Appeal (IBCA) cases petitioner cites (Pet. Br. 24; see also Xan. Br. 4-6) are not persuasive authority that concession contracts are subject to the CDA. To begin with, the decisions of agency boards on questions of law are not binding on any federal court. *B.D. Click Co.* v. *United States*, 614 F.2d 748, 752 (Ct. Cl. 1980); 41 U.S.C. 609(b). Moreover, as the court of appeals correctly observed, the IBCA's "rationale for determining that concession contracts are procurement contracts is flawed." Pet. App. 28a. The first of the opinions, *R & R Enterprises*, No. 2417, 1989 WL 27790 (IBCA Mar. 24, 1989), was based on three manifestly false premises. First, as the court of appeals noted (Pet. App. 28a), the IBCA incorrectly believed that the CDA covered not only specific categories of "contracts * * * for * * * procurement" (41 U.S.C. 602(a)), but also all "procurement-*type activities*" *unless specifically excluded by statute.* 1989 WL 27790, at *24 (emphasis added). But the CDA does not extend to "procurement-*type*" contracts, and in light of Congress's specific attention to NPS concession contracts both before and after passage of

[19] Under petitioner's definition, for example, the CDA would include plea agreements under which the government "obtained" the "services" of a criminal defendant as a witness. But cf. *Janowsky* v. *United States*, No. 92-5004, 1993 WL 36863, at *2-3 (Fed. Cir. Feb. 17, 1993) (agreement to perform as confidential informant not covered by CDA). Similarly, an agreement for a corporation to infuse assets into a failing financial institution in exchange for the government's agreement to permit that corporation to treat "supervisory goodwill" as a capital asset for a certain period would seem to be included. But see *Winstar Corp.* v. *United States*, 21 Cl. Ct. 112, 117 (1990) (agreement not covered by CDA), aff'd, 64 F.3d 1531 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996).

the CDA, there is no warrant for presumptively sweeping that distinct category of contracts within the terms of the CDA.

Second, without examining the meaning of "procurement contracts" in government contract law, or analyzing the text of any of the relevant NPS concession or government procurement statutes, the IBCA created a false dichotomy by assuming that contracts involving acquisition must either be a federal assistance program under the FGCAA or a procurement contract covered by the CDA. 1989 WL 27790, at *24. Because the government disavowed any interest in "assisting" the concessioner under the FGCAA, the IBCA assumed that the government's "sole contractual purpose *must therefore be* to 'acquire' the services of a private contractor * * * to provide goods or services to the general public." *Ibid.* (emphasis added). The board paid no heed, however, to FGCAA's language stating that procurement contracts must be for the "direct benefit or use" of the agency. Finally, the IBCA simply assumed, without citing to any statute, regulation, evidence in the administrative record, or historical practice, that NPS concession contracts were "for services that the Government itself would otherwise provide." *Id.* at *25. However, NPS has not traditionally provided services of the sort offered by concessioners and is not required to provide concession services at parks. Indeed, concession services are not offered at *most* properties administered by NPS.[20] See Gov't Lodging 6. Both *National Park Concessions, Inc.*, No. 2995, 1994 WL 462401 (IBCA Aug. 18, 1994), and *Watch Hill Concession,*

[20] The decision in *Starfleet Marine Transportation*, No. B-290, 2002 WL 1461877, at *5 (Comp. Gen. July 5, 2002), cited by petitioner (Pet. Br. 36), similarly erred by assuming that NPS "might otherwise have had to purchase or perform [concession services] itself" in determining that concession contracts were procurement contracts.

Inc., No. 4284-2000, 2001 WL 170911 (IBCA Feb. 16, 2001), (written by the author of *R&R Enterprises*) rest principally on that flawed decision.

C. Concession Contracts Do Not Implicate The Purposes That Animated The Contract Disputes Act

Congress enacted the CDA to implement two central recommendations of the Commission on Government Procurement to correct specific flaws in the then-existing disputes resolution system. First, as petitioner notes (Pet. 18, 19), Congress allowed contractors to bypass administrative proceedings in favor of going directly to the U.S. Claims Court (as it was then known) for a "fully judicialized totally independent forum." S. Rep. No. 1118, *supra*, at 11; see 41 U.S.C. 609(a)(1). Second, Congress provided contractors prejudgment interest, in recognition of the fact that contractors were ordinarily required to continue performing under the contract during the pendency of any dispute, and, even if successful, ordinarily would receive payment only at the end of the dispute. 41 U.S.C. 611; see also 4 *Commission Report* 3, 29, 31-32. Justifying that extraordinary remedy, Congress emphasized the "unique" (S. Rep. No. 1118, *supra*, at 32) position of contractors providing goods and services to the government under procurement contracts:

> [T]hey have been required by the language of the contract * * * to perform the work as directed by the government without stopping to litigate. * * * *Since the contractor has been compelled to perform the work with its own money—in the total absence of contract payments or progress payments*—there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.

Ibid. (emphasis added).

Neither of those concerns is implicated here. Contrary to petitioner's claims, recognition of the fact that the CDA does not encompass NPS concession contracts will not deny contractors procedural "due process protections" (Pet. Br. 19) nor "direct access to courts." *Id.* at 18. Whether a concession contract is covered by the CDA or not, the claimant has, in either U.S. District Court or the Court of Federal Claims, access to a "fully judicialized totally independent forum" for the resolution of disputes arising out of the concession contract. S. Rep. No. 1118, *supra*, at 11 (quoting 4 *Commission Report* 23-24). Aside from congressionally mandated arbitration of certain issues under the 1998 Act, see 16 U.S.C. 5954(b)(2) (respecting value of possessory interest under 1965 Act); 16 U.S.C. 5956(b) (respecting adjustment of franchise fee), a concessioner would be able to bring claims relating to a contract in federal court under the Tucker Act or Little Tucker Act. See *YRT Servs. Corp.*, 28 Fed. Cl. at 370 n.2; *Bailey* v. *United States*, 46 Fed. Cl. at 211-212 (although the alleged agreement "falls outside the reach of the CDA" it was "within Tucker Act contract jurisdiction"). Indeed, some courts have permitted review of concessioners' claims in District Court under federal-question jurisdiction. See, *e.g.*, *Hamilton Stores, Inc.* v. *Hodel*, 925 F.2d 1272, 1277-1278 (10th Cir. 1991); *Fort Sumter Tours, Inc.* v. *Andrus*, 564 F.2d 1119, 1124 (4th Cir. 1977). NPS concessioners, then, regardless of the CDA's applicability, will have their "right to a day in court." S. Rep. No. 1118, *supra*, at 11.

Nor do concession contracts implicate Congress's rationale for providing prejudgment interest. Concessioners are not in the "unique" (S. Rep. No. 1118, *supra*, at 32) position

of contractors providing goods or services under a procurement contract, who ordinarily must obtain financing to continue performing, without payment, during the pendency of the dispute. Concessioners can continue to operate (and collect revenues from park visitors) during the pendency of disputes unless and until the contract has been terminated. Of course, concessions operations may be suspended "to protect [park] visitors or to protect, conserve and preserve [park] resources" (J.A. 107; see also 65 Fed. Reg. at 26,072; *id.* at 44,905; *id.* at 44,916), or terminated (after a contractually prescribed cure period) to protect visitors or resources or for material breach. See J.A. 107-108; 65 Fed. Reg. at 26,072; *id.* at 44,905; *id.* at 44,916-44,917. But suspension and termination obviate the duty to continue performance. Furthermore, suspensions in operations have been quite rare, and terminations rarer still. Thus, far from "be[ing] compelled to perform the work with its own money—in the total absence" of payments (S. Rep. No. 1118, *supra*, at 32), during the pendency of most concession contract disputes, concessioners will continue to earn revenue.

D. Recognizing That The CDA Does Not Cover Concession Contracts Will Not Lead To Abuses

Petitioner and Xanterra argue that, if their claims are rejected, agencies would be "entirely at liberty to manipulate" (Pet. Br. 29; see also *id.* at 19; Xan. Br. 1) the terms of payment under their contracts and could "freely * * * exempt themselves from[] the CDA," posing "mortal dangers to the CDA regime." Xan. Br. 1. That concern is illusory. To begin with, the definition of procurement petitioner resists undisputedly applies throughout the rest of procurement law, most notably the FAR. See Pet. Br. 27. If petitioner were correct that agencies are able to manipulate the funding of procurement programs, the burden of compliance with the detailed provisions of FAR would provide a

far greater incentive to do so than the mere prospect of paying prejudgment interest on some future contract claims (the only substantive difference stemming from CDA coverage, from agencies' viewpoint). Furthermore, if petitioner's concerns were valid, such abuses presumably would already be widespread, because courts have been making this very distinction for years. See, *e.g.*, *YRT Servs.*, 28 Fed. Cl. at 392 n.23; *Institut Pasteur*, 814 F.2d at 627-628.

Petitioner's failure to point to any real-world examples of such abuse demonstrates the second flaw in its argument: There simply is not significant opportunity for manipulation. There are very few circumstances under which the government now purchases goods or services under which contractors would be willing to provide them at no cost (or to pay the government to provide them). Cf. *Notices: Office of Management and Budget*, 55 Fed. Reg. 45,893, 45,894 (1990) (noting low likelihood of receiving offers to pay the government to perform required services). Whatever the risk of manipulation generally, it is not present in this case. This case does not involve an agency's recent effort to avoid procurement laws by structuring transactions in a novel way. Rather, Congress itself created, and has maintained, a distinct regime under which private parties provide services to park visitors at private expense through concession contracts. See *ibid.* (distinguishing between when services "would, under normal circumstances, be expected to be paid for by the Government from appropriated funds" and "contracts which do not evolve from the appropriation process (*e.g.*, * * * *concessions*)") (emphasis added).

III. CONGRESS'S HISTORICALLY DISTINCT REGULATORY SCHEME FOR NPS CONCESSIONS CONFIRMS THAT CONCESSION CONTRACTS ARE NOT "PROCUREMENT CONTRACTS" UNDER FEDERAL PROCUREMENT LAW

A. Congress Has Historically Distinguished Between NPS Concession Contracts And Procurement Contracts

Congress traditionally has drawn a distinction between concession contracts for the provision of services to park visitors and the procurement of services or property by the Park Service itself. In 1927, the Comptroller General rendered a decision holding that concession contracts let by the Department of the Interior came within the general federal procurement law requiring public advertising and competitive bidding for "[a]ll purchases and contracts for supplies and services." Rev. Stat. § 3709 (1875); see also Rev. Stat. § 3710 (1875). Congress acted promptly to reverse the "strained" decision of the Comptroller General (*Interior Department Appropriation Bill: Hearings Before a Subcomm. of the Senate Comm. on Appropriation*, 70th Cong., 1st Sess. 180 (1928) (statement of Sen. Hayden)) by amending the Organic Act to make clear that concession contracts were not subject to the existing procurement laws. Congress authorized the Secretary to grant "said privileges, leases, and permits" to permit visitor facilities and services in the national parks and to "enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids." Act of Mar. 7, 1928, ch. 137, § 1, 45 Stat. 235. The sponsor of the legislation explained that application of the general procurement law was inappropriate because "*contracts made with these operators in the national parks are made not for the service to be furnished to the Government but for*

service to be furnished to the public who go to the parks." 69 Cong. Rec. at 3710 (statement of Rep. Cramton) (emphasis added).

Congress traditionally has used markedly different language when authorizing NPS to procure goods or services on its own behalf, distinguishing between concession contracts "grant[ing] privileges, leases, and permits * * * for accommodation of [park] visitors" for the public benefit, and "contract[s] for services" and goods to be provided directly to the government. The 1965 Act, like the Organic Act, did not speak in terms of the government procurement of services, but simply authorized the Secretary to "take such action as may be appropriate to encourage and enable * * * concessioners[] to provide and operate facilities * * * for the accommodation of visitors." 16 U.S.C. 20a (1994). By contrast, procurement statutes involving the Park Service plainly speak of acquiring, procuring, "contract[ing] for," or "hir[ing]" services for NPS. See, *e.g.*, 16 U.S.C. 1a-2(f) (authorizing Secretary to "[a]cquire * * * air-conditioning units for any Government-owned passenger motor vehicles used by the National Park Service"); 16 U.S.C. 17i (authorizing Secretary to "hire * * * work animals and animal-drawn and motor-propelled vehicles"). See Act of May 26, 1930, ch. 324, § 3, 46 Stat. 382 (authorizing the Secretary to "contract for services" with concessioners "for the furnishing of * * * services or accommodations *to the Government*" when NPS officials were visiting national parks) (emphasis added) (16 U.S.C. 17b); 72 Cong. Rec. 9159 (1930) (statement of Horace M. Albright, Director of NPS); H.R. Rep. No. 948, 71st Cong., 2d Sess. 3 (1930). The Secretary specifically noted that distinction in promulgating Section 51.3. See 65 Fed. Reg. at 20,635; J.A. 165.

B. The Text Of The 1998 Act Reflects The Historical Distinction Between Concession Contracts And Procurement Contracts

The language of the 1998 Act likewise reflects the distinction between concession contracts and the procurement of services for NPS. The Act provides that "the Secretary shall utilize concession contracts to authorize private entities to provide accommodations, facilities and services to visitors to areas of the National Park System." Pub. L. No. 105-391, § 403, 112 Stat. 3504 (16 U.S.C. 5952). That language differs from procurement statutes in two significant respects. First, in keeping with Congress's traditional practice in authorizing NPS concessions, it speaks in terms of authorizing third parties to "provide" visitor accommodations, facilities and services. In contrast, the two basic government procurement statutes—the Armed Services Procurement Act of 1947, 10 U.S.C. 2302 *et seq.*, and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 251 *et seq.*—directly authorize "[t]he head of an agency" to "provide for *the procurement of property or services*." 10 U.S.C. 2304(b)(1); accord 10 U.S.C. 2304(b)(2); 41 U.S.C. 252(a) ("[e]xecutive agencies shall make purchases and contracts for property and services" in accordance with provisions of particular subchapter of Title 41); 41 U.S.C. 253(b)(1) ("[a]n executive agency may provide for the procurement of property and services"). The difference is telling.[21]

[21] Petitioner notes (Pet. Br. 6) that the 1998 Act contains an express exemption from the statutory requirement that "the leasing of buildings and properties shall be for a money consideration only" (40 U.S.C. 303b (2002), recodified at 40 U.S.C. 1302), and which explicitly prohibits reduction in rents for tenants who perform repairs to a structure. Although petitioner implies that that specific exemption suggests Congress intended concession contracts to be covered by the CDA, its inclusion will not bear that inference. Section 303b would of its own terms explicitly have applied to some concessions, which may involve a form of "lease."

Second, the 1998 Act specifically provides that those services will be provided to someone *other* than the government, *i.e.*, "*to visitors.*" In stark contrast, procurement statutes commonly specify that the property or service will be "procure[d] *by [the] agenc[y], for its use.*" See, *e.g.*, 10 U.S.C. 2303(a) (emphasis added); 41 U.S.C. 5 ("purchases and contracts for supplies or services *for the Government* may be made" under specified circumstances) (emphasis added); 41 U.S.C. 252(b) (setting forth policy that a portion of the "total purchases and contracts for property and services *for the Government*" shall be placed with small businesses) (emphasis added). Cf. 31 U.S.C. 6303 (procurement contracts are for "direct benefit or use of the United States Government").

That Congress intentionally drew the concessions provision of the 1998 Act to distinguish concession contracts from procurement contracts is plain from other provisions of the 1998 Act. In response to concerns that some NPS employees lacked technical business skills to administer the concessions program effectively, the 1998 Act authorized the Secretary to "[c]ontract[] for services" to "conduct or assist" in the management of the concessions program and "to assist the Secretary" with specified aspects of the program. 16 U.S.C. 5959(a)(1) and (2). That provision both uses conventional procurement language, cf. 41 U.S.C. 5 (authorizing "contracts * * * for services"); 41 U.S.C. 252(b) (same), and plainly indicates that those services are obtained by and for the use of NPS. Congress presumably was aware of the historic distinction it had drawn between the authorization of third parties to provide services to visitors and the direct procurement of goods and services by NPS, and intended to

There was no need for a similar textual provision to exclude concession contracts from the scope of the CDA, which does not by its own force apply to them.

employ that distinction in the Act. See *Erlenbaugh*, 409 U.S. at 244 ("whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject").[22]

The implication is clear. As the committee reports of the 1998 Act stated, "concession contracts * * * do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998); accord H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998).

C. Congress Has Ratified The National Park Service's Long-Held View That NPS Concession Contracts Are Not Procurement Contracts Under Federal Procurement Law

Although respondent Xanterra disparages the expressions of congressional intent in the 1998 Act's committee reports to be mere "orphaned statement[s]" that were "planted in the * * * legislative history," Xan. Br. 28, they actually reflect Congress's awareness of and agreement with NPS's longstanding interpretation of the role of concession contracts in the procurement system and ratification of it. Shortly after Congress first began hearings on the legislation that ultimately became the 1998 Act, NPS amended its definition of concession contract to "clarif[y] the status of concession contracts, which NPS has never considered a

[22] Other aspects of the 1998 Act are also inconsistent with the notion that concession contracts are a type of procurement subject to the CDA. For example, Congress provided that two of the most likely subjects of dispute—valuation of possessory interests under the 1965 Act and adjustments in franchise fees—would be subject to binding arbitration. 16 U.S.C. 5954(b)(2) (possessory interest), 5956(b) (franchise fees). Although (if petitioner is correct) such disputes would have been subject to resolution in administrative board of contract appeals hearings or in court, neither the 1998 Act nor its legislative history mentions the CDA or any reason why Congress would have decided not to apply usual CDA procedures in this instance.

type of federal procurement contract." 57 Fed. Reg. at 40,498; see also 36 C.F.R. 51.1 (1993); Gov't Lodging 2. Because the 1992 NPS regulations also included provisions to increase competition in concession contracting, the regulations were a frequent topic of hearings and committee reports.[23] Although most of the discussion of the regulations concerned preferential renewal rights and possessory interests in property, the record clearly indicates that the regulations as a whole were reviewed by Congress in considering the reforms that became the 1998 Act. *E.g.*, *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 54 (statement of Sen. Bumpers).

Moreover, one of the central concerns before Congress in developing the legislation that became the 1998 Act was how closely concession contracting—which historically had not been subject to general procurement laws—should follow the model of competitive procurement. See, *e.g.*, S. Rep. No. 202, *supra*, at 20; H.R. Rep. No. 767, *supra*, at 21-22. As part of the 1998 Act, Congress eliminated the concession contracts' statutory exemption from requirements of advertisement and competitive bidding. See Pub. L. No. 105-391, Tit. IV, § 415(b)(1), 112 Stat. 3515 (1998). But in creating a replace-

[23] See, *e.g.*, *National Park Service Concessions Policy Reform Act of 1991: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 102d Cong., 2d Sess. 31-32 (1992); *id.* at 37-38, 44, 63 (noting "considerable dialogue" on 1992 regulations) (statement of James D. Santini); *id.* at 64-66, 126, 189-193; *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 24-25, 54 (statement of Sen. Bumpers); H.R. Rep. No. 767, *supra*, at 22; S. Rep. No. 202, *supra*, at 20.

ment for the old system of concessioner selection, Congress rejected the procurement model (cf. 10 U.S.C. 2304(a)(1); 41 U.S.C. 253(a)(1)) in favor of a unique regulatory system that "subordinate[d]" monetary considerations to the "objectives of protecting, conserving, and preserving" park resources and making services available "to the public at reasonable rates." 16 U.S.C. 5952(5)(A)(iv). That was based in part on considerable testimony from NPS officials, environmentalists, and concessioners themselves arguing that the procurement model was inappropriate in the concessions context. The chairman of the Conference of National Park Concessioners (as petitioner NPHA was then named, see *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 38) urged Congress to reject the procurement model and instead to consider concessioners akin to a "regulated utility" providing goods and services to the public under NPS supervision. *National Park Concessions Measures: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 92 (1991) (statement of Rex Maughan) ("should the National Park Service be made to conduct the contracting for concessions in the same way GSA would order paper clips or elastic bands for the government? * * * Or is contracting with the National Park Service more analogous to a highly regulated utility * * *? Clearly, the history of National Park concessions indicates that the latter is more clearly what has been sought and for good reason."). Other industry witnesses likewise echoed the theme that concessioners should be considered akin to "public utilities" providing "goods and services[] for visitors to national parks." *National Park Service Concessions Policy Reform Act of 1991: Hearings Before the Subcomm. on Public Lands, National Parks and*

Forests of the Senate Comm. on Energy and Natural Resources, 102d Cong., 2d Sess. 76 (1992) (statement of George E. Campsen, Jr.). And in discussing the need for competition, one of the sponsors of the Competition in Contracting Act (a statute that, like the CDA, grew out of the recommendations of the Commission on Government Procurement) explicitly drew a distinction between "the Government's acquisition of goods and services" under the procurement laws and "the Government's contracts with concessionaires who bid for the right to provide goods and services *to the millions of people who visit our national parks every year.*" 140 Cong. Rec. 5518 (1994) (statement of Sen. Cohen) (emphasis added).

In light of this history, the only reasonable interpretation is that, in passing the 1998 Act without changing NPS's existing regulation that concession contracts are "not federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to federal procurement actions" (57 Fed. Reg. at 40,503), Congress ratified that understanding. Cf. *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) ("when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). The statements in the committee reports thus were not isolated statements "planted" (Xan. Br. 28) by a congressional staffer, but reflected Congress's conscious design, apparent in the particular language Congress chose for the separate concession and procurement sections of the 1998 Act, that the Act and regulations issued thereunder *alone* governed concession contracts. As both committees indicated, "the policies and procedures of this title as implemented by the Secretary's regulations"—and not federal procurement law—"are the governing require-

ments for concession contracts." S. Rep. No. 202, *supra*, at 39; accord H.R. Rep. No. 767, *supra*, at 43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

JANUARY 2003

ADDENDUM

1. 16 U.S.C. 1 provides:

Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall have substantial experience and demonstrated competence in land management and natural or cultural resource conservation. The Director shall select two Deputy Directors. The first Deputy Director shall have responsibility for National Park Service operations, and the second Deputy Director shall have responsibility for other programs assigned to the National Park Service. There shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

2. 16 U.S.C. 3 provides:

Rules and regulations of national parks, reservations, and monuments; timber; leases

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2 and 4 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all cost of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. No natural,[1] curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: *Provided, however*, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further*, That the Secretary of the Interior may grant said

[1] So in original.

privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further*, That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing.

3. 16 U.S.C. 5951 provides:

Congressional findings and statement of policy

(a) Findings

In furtherance of sections 1, 2, 3, and 4 of this title, which directs[2] the Secretary to administer units of the National Park System in accordance with the fundamental purpose of conserving their scenery, wildlife, and natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation and conservation of park resources and values requires that such public accommodations, facilities, and services as have to be provided within such units should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that—

(1) visitation will not unduly impair these resources and values; and

(2) development of public accommodations, facilities, and services within such units can best be limited to locations that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of such units.

[2] So in original.

(b) Policy

It is the policy of the Congress that the development of public accommodations, facilities, and services in units of the National Park System shall be limited to those accommodations, facilities, and services that—

(1) are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located; and

(2) are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit.

4. 16 U.S.C. 5952 provides in pertinent part:

Award of concessions contracts

In furtherance of the findings and policy stated in section 5951 of this title, and except as provided by this subchapter or otherwise authorized by law, the Secretary shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System. Such concessions contracts shall be awarded as follows:

(1) Competitive selection process

Except as otherwise provided in this section, all proposed concessions contracts shall be awarded by the Secretary to the person, corporation, or other entity submitting the best proposal, as determined by the Secretary through a competitive selection process. Such competitive process shall include simplified procedures for small, individually-owned, concessions contracts.

(2) Solicitation of proposals

Except as otherwise provided in this section, prior to awarding a new concessions contract (including renewals or extensions of existing concessions contracts) the Secretary shall publicly solicit proposals for the concessions contract and, in connection with such solicitation, the Secretary shall prepare a prospectus and shall publish notice of its availability at least once in local or national newspapers or trade publications, and/or the Commerce Business Daily, as appropriate, and shall make the prospectus available upon request to all interested parties.

* * * * *

(5) Selection of the best proposal

(A) In selecting the best proposal, the Secretary shall consider the following principal factors:

(i) The responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.

(ii) The experience and related background of the person, corporation, or entity submitting the proposal, including the past performance and expertise of such person, corporation or entity in providing the same or similar facilities or services.

(iii) The financial capability of the person, corporation, or entity submitting the proposal.

(iv) The proposed franchise fee, except that consideration of revenue to the United States shall be subordinate to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates.

(B) The Secretary may also consider such secondary factors as the Secretary deems appropriate.

(C) In developing regulations to implement this subchapter, the Secretary shall consider the extent to which plans for employment of Indians (including Native Alaskans) and involvement of businesses owned by Indians, Indian tribes, or Native Alaskans in the operation of a concession, contracts should be identified as a factor in the selection of a best proposal under this section.

* * * * *

5. 16 U.S.C. 5954 provides in pertinent part:

Protection of concessioner investment

* * * * *

(b) Special rule for existing possessory interest

(1) A concessioner which has obtained a possessory interest as defined pursuant to Public Law 89-249 (commonly known as the National Park Service Concessions Policy Act; 16 U.S.C. 20 et seq.), as in effect on the day before November 13, 1998, under the terms of a concessions contract entered into before November 13, 1998, shall, upon the expiration or termination of such contract, be entitled to receive compensation for such possessory interest improve-

ments in the amount and manner as described by such concessions contract. Where such a possessory interest is not described in the existing contract, compensation of possessory interest shall be determined in accordance with the laws in effect on the day before November 13, 1998.

(2) In the event such prior concessioner is awarded a new concessions contract after the effective date of this subchapter replacing an existing concessions contract, the existing concessioner shall, instead of directly receiving such possessory interest compensation, have a leasehold surrender interest in its existing possessory interest improvements under the terms of the new contract and shall carry over as the initial value of such leasehold surrender interest (instead of construction cost) an amount equal to the value of the existing possessory interest as of the termination date of the previous contract. In the event of a dispute between the concessioner and the Secretary as to the value of such possessory interest, the matter shall be resolved through binding arbitration.

* * * * *

6. 16 U.S.C. 5956 provides in pertinent part:

Franchise fees

(a) In general

A concessions contract shall provide for payment to the government of a franchise fee or such other monetary consideration as determined by the Secretary, upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved. Such probable value shall be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Consideration of revenue to the United States shall be subordinate to the objectives of

protecting and preserving park areas and of providing necessary and appropriate services for visitors at reasonable rates.

(b) Amount of franchise fee

The amount of the franchise fee or other monetary consideration paid to the United States for the term of the concessions contract shall be specified in the concessions contract and may only be modified to reflect extraordinary unanticipated changes from the conditions anticipated as of the effective date of the contract. The Secretary shall include in concessions contracts with a term of more than 5 years a provision which allows reconsideration of the franchise fee at the request of the Secretary or the concessioner in the event of such extraordinary unanticipated changes. Such provision shall provide for binding arbitration in the event that the Secretary and the concessioner are unable to agree upon an adjustment to the franchise fee in these circumstances.

* * * * *

7. 16 U.S.C. 5959 provides in pertinent part:

Contracting for services

(a) Contracting authorized

(1) To the maximum extent practicable, the Secretary shall contract with private entities to conduct or assist in those elements of the management of the National Park Service concessions program considered by the Secretary to be suitable for non-Federal performance. Such management elements include each of the following:

(A) Health and safety inspections.

(B) Quality control of concessions operations and facilities.

(C) Strategic capital planning for concessions facilities.

(D) Analysis of rates and charges to the public.

(2) The Secretary may also contract with private entities to assist the Secretary with each of the following:

(A) Preparation of the financial aspects of prospectuses for National Park Service concessions contracts.

(B) Development of guidelines for a national park system capital improvement and maintenance program for all concession occupied facilities.

(C) Making recommendations to the Director of the National Park Service regarding the conduct of annual audits of concession fee expenditures.

* * * * *

8. 16 U.S.C. 5962 provides: -

Use of nonmonetary consideration in concessions contracts

Section 303b of Title 40, relating to the leasing of buildings and properties of the United States, shall not apply to contracts awarded by the Secretary pursuant to this subchapter.

9. 36 C.F.R. 51.3 provides in pertinent part:

How are terms defined in this part?

To understand this part, you must refer to these definitions, applicable in the singular or the plural, whenever these terms are used in this part:

* * * * *

A concession contract (or contract) means a binding written agreement between the Director and a concessioner entered under the authority of this part or the 1965 Act that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions. Concession contracts will contain such terms and conditions as are required by this part or law and as are otherwise appropriate in furtherance of the purposes of this part and the 1998 Act.

10. 41 U.S.C. 602 provides in pertinent part:

Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

* * * * *

11. 41 U.S.C. 605 provides in pertinent part:

Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle,

compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * * *

12. 41 U.S.C. 606 provides:

Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

13. 41 U.S.C. 607 provides in pertinent part:

Agency boards of contract appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall

have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

* * * * *

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

* * * * *

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

* * * * *

14. 41 U.S.C. 609 provides in pertinent part:

Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

* * * * *

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

* * * * *

15. 41 U.S.C. 611 provides:

Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate

established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

16. 41 U.S.C. 612 provides in pertinent part:

Payment of Claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

* * * * *

17. 41 U.S.C. 405 provides in pertinent part:

Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Admini-

strator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

* * * * *

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

* * * * *

(l) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

* * * * *

(8)

Supreme Court, U.S.
FILED
FEB 21 2003

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE NPS'S POSITION IGNORES THE TEXT AND HISTORY OF THE CONTRACT DISPUTES ACT OF 1978. 2

II. THERE IS NO SUPPORT FOR THE TWO IMPLIED LIMITATIONS ON CDA COVERAGE PROFFERED BY THE NPS. 5

A CDA Coverage Is Not Limited To Contracts Involving The Expenditure Of Government Funds. 5

B CDA Coverage Does Not Depend On Who May Be Said To "Benefit" From A Government Contract. 11

III. NPS CONCESSIONS CONTRACTS PROCURE A DIRECT BENEFIT FOR THE GOVERNMENT. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 7, 12, 13

Blanco-Mora Enterprises, Inc., HUDBCA No. 94-G-136-C5, 94-3 BCA ¶ 26,974, 1994 WL 248163 (June 10, 1994) 17

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 2

Cleveland v. *United States*, 531 U.S. 12 (2000) 9

Delta S.S. Lines, Inc. v. *United States*, 3 Cl. Ct. 559 (1983) 16, 17

Forsham v. *Harris*, 445 U.S. 169 (1980) 13

G.E. Boggs & Assocs., Inc. v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992) 9

Henke v. *U.S. Dep't of Commerce*, 83 F.3d 1445 (D.C. Cir. 1996) 15

Hernandez, ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742 (Dec. 12, 2000) 13

Hohn v. *United States*, 524 U.S. 236 (1998) 7, 12, 13

Institut Pasteur v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) 9

Janowsky v. *United States*, No. 92-5004, 1993 WL 36863 (Fed. Cir. Feb. 17, 1993) 17

New Era Construction v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) 17

R & R Enters., IBCA No. 2417, 1989 WL 27790 (Mar. 24, 1989) 14

TABLE OF AUTHORITIES – continued

Page(s)

Russello v. *United States*, 464 U.S. 16 (1983) 7

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 12, 15, 17

Trauma Serv. Group v. *United States*, 104 F.3d 1321 (Fed. Cir. 1997) 15

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 8

United States v. *Chatman*, 986 F.2d 1446 (D.C. Cir. 1993) 4

United States v. *Poff*, 926 F.2d 588 (7th Cir. 1991) (en banc) 4

United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 3

United States v. *Salerno*, 481 U.S. 739 (1987) 20

United States v. *Weddle*, 30 F.3d 532 (4th Cir. 1994) 4

Universal Interpretive Shuttle Corp. v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968) 16

Winstar Corp. v. *United States*, 21 Cl. Ct. 112 (1990) 17, 18

YRT Servs. Corp. v. *United States*, 28 Fed. Cl. 366 (1993) 19

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 5, 12

TABLE OF AUTHORITIES – continued

Page(s)

STATUTES, RULES AND REGULATIONS

The Long-Term Care Security Act of 2000 ("Long Term Care Act"), Pub. L. No. 106-265, 114 Stat. 762 (codified at 5 U.S.C. §§ 9001-9009) 15

16 U.S.C. § 1 ..... 16, 20

16 U.S.C. § 3 9

16 U.S.C. § 17b 16

National Park Service Concessions Policy Act of 1965 ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965) 9, 16

16 U.S.C. § 20 16

National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966) ..... *passim*

16 U.S.C. § 5951 ..... 16, 18, 20

16 U.S.C. § 5952 ..... 9, 16

28 U.S.C. § 1346 3

28 U.S.C. § 1491 3

Federal Grant and Cooperative Agreement Act of 1977 ("FGCAA"), Pub. L. No. 95-224, 92 Stat. 3 ..... *passim*

§ 4, 31 U.S.C. § 6303 ..... 9, 13, 14, 16, 18

§ 5, 31 U.S.C. § 6304 14

§ 6, 31 U.S.C. § 6305 14

41 U.S.C. § 423 ..... 10, 12

TABLE OF AUTHORITIES – continued

Page(s)

The Contract Disputes Act of 1978 ("CDA"), Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613) ..... *passim*

41 U.S.C. § 602 ..... 1, 3, 4, 6

41 U.S.C. § 612 11

Armed Services Procurement Act of 1947 ("ASPA"), Pub. L. No. 80-413, 62 Stat. 20 ..... 6, 7, 12

Federal Property and Administrative Services Act of 1949 ("FPASA"), Pub. L. No. 81-152, 63 Stat. 372 ..... 7, 12

Office of Federal Procurement Policy Act ("OFPPA"), Pub. L. No. 93-400, 88 Stat. 796 ..... 1, 6, 7, 8, 10

§ 6 ..... 7, 8

Office of the Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 649 8

Pub. L. No. 91-129, § 1, 83 Stat. 269 12

10 C.F.R. § 851.102 (1948) 6, 7, 12

41 C.F.R. § 1-1.208 (1960) 7, 12

41 C.F.R. § 1-1.209 (1960) 7

Federal Acquisition Regulation ("FAR") ..... *passim*

48 C.F.R. § 2.101 ..... 9, 10

48 C.F.R. pt. 33 9

TABLE OF AUTHORITIES – continued

Page(s)

Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224); Final OMB Guidance, 43 Fed. Reg. 36,860, 36,862 (Aug. 18, 1978) 14

Final Rule, 57 Fed. Reg. 40,496 (1992) 5

Standard Concessions Contract, 65 Fed. Reg. 26,052 (May 4, 2000) 20

Simplified Concession Contracts, 65 Fed. Reg. 44,894 (July 19, 2000) 20

Final Rule, 66 Fed. Reg. 2117 (Jan. 10, 2001) 9

MISCELLANEOUS

Dep't of Interior, 505 Departmental Manual 2.3(B), available at http://elips.doi.gov/elips/ release/ 3080.htm 15

Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable from Nonappropriated Funds* (1976) 8

RALPH C. NASH, JR. *ET AL.*, THE GOVERNMENT CONTRACTS REFERENCE BOOK (2d ed. 1998) 9, 10, 12

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) 13, 14

S. REP. NO. 80-571, 1947 U.S.C.C.A.N. 1048 12

S. REP. NO. 95-449, 1978 U.S.C.C.A.N. 11 13

S. REP. NO. 95-1118, 1978 U.S.C.C.A.N. 5235 ..... 2, 4, 11

REPLY BRIEF FOR THE PETITIONER

The most remarkable aspect of the National Park Service's brief is how little attention it pays to the actual *text* of the Contract Disputes Act or to the reasons for the statute's enactment. Instead, the agency focuses on everything from the Federal Grant and Cooperative Agreement Act of 1977 ("FGCAA"), Pub. L. No. 95-224, 92 Stat. 3, to the Office of Federal Procurement Policy Act ("OFPPA"), Pub. L. No. 93-400, 88 Stat. 796, to the Federal Acquisition Regulation ("FAR"), to an offhand remark by a member of Congress 50 years *before* Congress passed the CDA – all in an attempt to induce this Court to impose two limitations on the CDA's broad scope. According to the NPS, the CDA applies only if (a) the government has expended "government funds" in conjunction with the subject contract and (b) that contract is for an acquisition "by and for the direct use and benefit of the federal government." Resp. Br. 27. The NPS asserts that its concessions contracts meet neither of these requirements.

There are several fundamental problems with the agency's approach. First, and foremost, the NPS ignores the fact that the question before this Court is the correct interpretation of section 3(a) of the CDA, rather than the terms of a hypothetical, paradigmatic "procurement contract." The agency does not, and cannot, claim that its limitations have any textual basis within the CDA itself. The statutory language controls, however, and it is irrelevant how closely NPS concessions contracts resemble the "typical" (Resp. Br. 26) form of a "procurement contract," if such a thing even exists. But beyond that, on closer examination the agency's arguments in support of these limitations fall apart. The NPS offers no explanation for *why* Congress would have wanted to impose either of these limitations on a statute addressing dispute-resolution mechanisms. Finally, the NPS's claim that its concessions contracts do not involve the procurement of services for the government, even if that were a relevant criterion, is

baseless. NPS concessioners play a critical role in assisting the agency to fulfill its statutorily mandated mission. Without concessioners the agency would be obligated to undertake itself the essential services that concessioners now perform.[1]

I. THE NPS'S POSITION IGNORES THE TEXT AND HISTORY OF THE CONTRACT DISPUTES ACT OF 1978.

As discussed in our opening brief (at 18), the CDA is an intentionally broad statute that Congress intended to cover the vast range of procurements across differing parts of the government.[2] Congress excluded only a few, narrow types of procurements from the CDA, such as contracts for the purchase of real property and certain contracts entered into by the Tennessee Valley Authority. This breadth of coverage was necessary to the goals of the CDA, which included standardizing dispute-resolution practices across government contracts, improving administrative settlement processes, authorizing *de novo* review in court and in the boards of contract appeals, and providing successful disputants prejudgment interest. See Pet. Br. 3-4.[3]

Thus, rather than applying only to "procurement contracts," as the NPS asserts, the CDA mandates that *"[u]nless otherwise specifically provided"* within the statute itself, the CDA "applies to *any* express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency" for the procurement of goods, services, and the construction and repair of real property, as well as for the disposal of goods. 41 U.S.C. § 602(a) (emphasis added).

As this Court has explained, a statute that "begins with 'except as otherwise provided by law' creates a general rule that applies *unless contradicted in some other provision.*" See *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) (emphasis added). The NPS does not claim that its contracts fall within any of the explicit, textual, exceptions to CDA coverage. Nor does it deny that NPS concessions contracts are contracts for services, and in many instances also cover the construction, repair, or maintenance of real property. Rather, underlying the agency's brief is the assumption that the CDA applies only to what it insists are "typical" procurement contracts. But there is no authority for this assumption.

For example, the government devotes only a footnote to the fact that the CDA applies to contracts in which the government *sells* goods. See 41 U.S.C. § 602(a)(4); Resp. Br. 8 n.4. Such contracts, of course, are not "procurement contracts." And even were the agency correct that the generic

---

[1] The NPS's plea for deference (Resp. Br. 12-15) should be rejected. The NPS does not claim to have interpretive authority over the CDA or to be implementing another agency's regulation. See Pet. App. 27a. Unlike *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998), there is no consistent interpretation *across* agencies; rather, as discussed in our opening brief (at 25-26), other agencies have found that the CDA *does* apply to concessions contracts. Affording *any* of these individual agency interpretations deference would undermine the CDA's goal of standardizing dispute-resolution practices. See Pet. Br. 11 n.2.

[2] The NPS claims that our reliance on the legislative history of the CDA – which stresses the statute's breadth – is misplaced, because some early versions of the statute were even broader than the enacted version. See Resp. Br. 26-27. But the coverage provision in the version reprinted in the Senate Report on which we relied (see S. REP. NO. 95-1118, at 43-44, 1978 U.S.C.C.A.N. 5235) is identical to the enacted bill. The NPS's own excerpts from the statute's legislative history – two quotes from the floor debate on the bill (see Resp. Br. 26) – both relate to amendments whereby Congress *explicitly* exempted certain TVA contracts from the final statute. Of course, Congress could have explicitly exempted NPS concessions contracts as well.

[3] The NPS argues that these goals are not implicated here (see Resp. Br. 38-40), but it addresses only two of these goals and unduly minimizes them. For example, the NPS stresses that concessioners will have access to court regardless of whether the CDA applies, but it ignores the fact that the CDA mandates *de novo* review by an independent tribunal, that the agency pay prejudgment interest, and that less formal alternative procedures be provided through an agency's Board of Contract Appeals.

terms "procurement contract" and "contract for procurement" have identical meanings (Resp. Br. 17 n.7), the CDA does not use *either* of these terms.[4] There is no one "adjectival prepositional phrase" (*ibid.* (emphasis omitted)) in the CDA; there are four (see 41 U.S.C. § 602(a)(1)-(4)), only three of which address procurement. Furthermore, neither of the two adjectival phrases relevant to this litigation is the generic phrase "for procurement." Rather, each is more specific and nuanced: "for the procurement of services" and "for the procurement of construction, alteration, repair or maintenance of real property."

Instead, the only question for CDA purposes is whether a binding agreement between the NPS and a concessioner is an "express or implied contract * * * entered into by an executive agency for * * * the procurement of services [or] the procurement of construction, alteration, repair or maintenance of real property." As demonstrated in our opening brief, concessions contracts plainly satisfy these criteria. It follows that the question whether Congress may have "distinguished between NPS concession contracts and procurement contracts" for *other* purposes (Resp. Br. 42) is immaterial.[5]

---

[4] That a prepositional phrase can differ in meaning from its adjectival "equivalent" is evident, however. For example, several courts of appeals have rejected the very interpretation of the Sentencing Guidelines that the Seventh Circuit reached in the opinion from which respondents pull their quote about refusing to "tease meaning" from the difference between an adjective and a prepositional phrase. Compare *United States* v. *Poff*, 926 F.2d 588, 591 (7th Cir. 1991) (en banc) with *United States* v. *Chatman*, 986 F.2d 1446 (D.C. Cir. 1993); *United States* v. *Weddle*, 30 F.3d 532 (4th Cir. 1994).

[5] For example, snippets from hearings and statutes predating the CDA (see Resp. Br. 42-43) are irrelevant, given Congress's intent, in the CDA, to "unify the diverse and often inconsistent procedures" that preceded it. See S. REP. NO. 95-1118, at 17; Pet. Br. 16-19. And differences in phraseology between the 1998 Act and assorted procurement statutes gain the agency nothing; more "telling" (Resp. Br. 44) is the fact that numerous other concessions contracts have been held to be subject to the CDA. See Pet. Br. 25-26. Similarly, *none* of the various quotes from congressional hearings on the NPS concessions program (see Resp. Br. 31-32, 47-49), nor the hearings themselves, had anything to do with either the CDA or with dispute resolution generally. Thus, the NPS's attempt (Resp. Br. 46) to rehabilitate an aside in the committee reports about the 1998 Act, even were such post-enactment legislative history probative (but see Xanterra Br. 28-30), is entitled to no weight here. Finally, the fact that in 1992 the NPS stated that it did not view concessions contracts to be "'a type of federal procurement contract'" (Resp. Br. 46-47 (quoting Final Rule, 57 Fed. Reg. 40,496, 40,498 (1992)) is of no significance. Apart from the threshold question whether such vague language implicates the CDA, it could nevertheless not be relied on as an indication of Congress's intent in passing the 1998 Act given that the NPS's view has consistently been rejected by the IBCA and the Comptroller General (Pet. Br. 24, 35).

[6] For example, the agency relies on *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552 (Ct. Cl. 1978), to assert that the expenditure of government funds is necessary for CDA coverage. See Resp. Br. 30 n.14. But although *Yosemite Park* did involve such an expenditure, the case did not turn on it; what the case really demonstrates is that the procurement of services – there, shuttle bus service – *for the public* suffices for CDA coverage. See Pet. Br. 31-32.

II. THERE IS NO SUPPORT FOR THE TWO IMPLIED LIMITATIONS ON CDA COVERAGE PROFFERED BY THE NPS.

Unable to deal with the plain language of the CDA, the NPS has sought to create two implied limitations on CDA coverage. But neither limitation has any legitimacy, and indeed in many instances the authority that the agency uses to support one of its limitations directly undermines the other.[6]

A CDA Coverage Is Not Limited To Contracts Involving The Expenditure Of Government Funds.

Nothing about the language or the purpose of the CDA suggests that the statute should be limited to contracts that "obligate payment using government funds" (Resp. Br. 27). As discussed in our opening brief (at 27-29), there is no logical reason to distinguish among contracts in which the government seeks to enter into a commercial arrangement with a private contractor based on the form of consideration pro-

vided by the government – especially when the issue is what dispute resolution mechanisms should be available.

The NPS's defense of this implied limitation suffers from a number of flaws. To begin with, the NPS consistently glosses over the distinction between contracts involving the expenditure of *appropriated funds* and contracts involving the expenditure of *government funds*, primarily referring to statutes or regulations that are expressly limited to contracts involving appropriated funds.[7] But the NPS does not and cannot claim that the CDA is limited to appropriated-funds contracts.[8] Rather, it invents a new category – "government funds" – to which it seeks to limit the CDA. But no other statute has been limited to contracts that "obligate payment using government funds" (Resp. Br. 27), and the agency never even defines that novel phrase.

Furthermore, rather than supporting the NPS's proposition that *all* government "procurement" statutes, including the CDA, are limited to contracts involving appropriated (or other government) funds, the statutes the NPS cites prove exactly the opposite.

For example, there is no definition of "procurement" or "procurement contract" in the ASPA (Resp. Br. 20-21). Rather, Congress explicitly limited the "*applicab[ilty]*" of that statute "to all purchases and contracts for supplies or services made by [the military] * * * to be paid for from appropriated funds." ASPA § 2(a), 62 Stat. 20. This provision shows that Congress knows how to limit a statute to appropriated funds when it chooses to do so. But it did not include such a limitation in the CDA, and "it is a general principle of

[7] See, *e.g.*, Resp. Br. 19 (FAR); Resp. Br. 20-21 (Armed Services Procurement Act of 1947 ("ASPA"), Pub. L. No. 80-413, 62 Stat. 20); Resp. Br. 21 (10 C.F.R. § 851.102 (1948)); Resp. Br. 24 n. 11 (OFPPA).

[8] See, e.g., Resp. Br. 27-28; Br. in Opp. 11 n.4; given the fact that the CDA applies by its terms to sales contracts and to contracts of some non-appropriated funds instrumentalities (41 U.S.C. § 602(a), (a)(4)) such an argument would, in any event, be frivolous.

statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 439-440 (2002) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see also *Hohn* v. *United States*, 524 U.S. 236, 250 (1998) (applying same rule where statutory language appeared in only one of two different Acts). The Federal Property and Administrative Services Act of 1949 ("FPASA"), Pub. L. No. 81-152, 63 Stat. 372, is equally unhelpful to the NPS's argument; like the ASPA, it contains no discussion of the meaning of the term "procurement" or "procurement contract," and it does not even contain an appropriated-funds limitation.[9]

The OFPPA (Resp. Br. 23-24) undermines the NPS's argument even more directly; its primary provision delineating OFPP's authority echoes the CDA: OFPP was given the power to "prescribe policies, regulations, procedures, and forms" to be "followed by executive agencies * * * in the procurement of (A) property other than real property in be-

[9] The regulations implementing these statutes (Resp. Br. 21) also undermine the NPS's argument. The first (10 C.F.R. § 851.102 (1948)) merely implements the ASPA's *explicit* appropriated-funds limitation. The second (41 C.F.R. § 1-1.208 (1960)), which was part of the Federal Procurement Regulation ("FPR") – the predecessor to the FAR – defines "contract" very broadly; it explains only that contracts *normally* obligate the "seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor," and "*include*[] all types of commitments which obligate the Government to an expenditure of funds" (emphasis added). Neither of those provisions limits the meaning of the term "contract" or "procurement contract" to ones *requiring* the expenditure of "government funds." In fact, the FPR defined "procurement" to mean "the acquisition * * * from non-Federal sources, of personal property and nonpersonal services (including construction) *by such means as purchasing, renting, leasing (including real property), contracting, or bartering*, but not by seizure, condemnation, donation, or requisition" (41 C.F.R. § 1-1.209 (1960) (emphasis added)) – a definition that does not require the expenditure of government funds.

ing; (B) services, including research and development; and (C) construction, alteration, repair, or maintenance of real property." OFPPA § 6(a), 88 Stat. 796. But Congress *separately*, and unlike in the CDA, statutorily limited OFPP's authority to "procurement payable from appropriated funds." *Id.* § 6(c). The obvious implication is that, but for this limitation, OFPP's authority *would* have extended to executive-agency contracts that did not involve appropriated funds; any other reading of the statute would violate a "cardinal principle of statutory construction" by rendering the appropriated-funds restriction surplusage. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Because the CDA does not include such a limiting clause, its scope is not confined to appropriated-funds contracts.[10]

The FGCAA (Resp. Br. 25) contradicts the government's argument as well. Although this statute does not define the

[10] As the NPS acknowledges, the OFPPA required OFPP to study whether to eliminate the appropriated-funds limitation on OFPP's authority. See OFPPA § 6(c); Resp. Br. 24 n.11. That study further undermines the NPS's argument. The report focused on procurement by "Nonappropriated Fund Instrumentalities" ("NAFIs") (see Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable from Nonappropriated Funds* ("*Study*") 3-6 (1976)), which were excluded from OFPP's dominion by the appropriated-funds limitation. (It is undisputed that the NPS is not a NAFI. See *id.* at G-3; Br. in Opp. 11 n.4.) The study included an extensive discussion of concessions contracts (see *Study* at 377-378) and specifically mentioned concessions contracts used by NAFIs in several agencies. See, *e.g.*, *id.* at 231 (NSA NAFI); *id.* at 236 (Defense Supply Agency NAFI); *id.* at 308 (NASA NAFI). As the study explained, certain types of customer services are frequently provided by NAFIs under "customer service contracts," which are either "concession contract[s]" (where the concessioner pays a fee to the NAFI in consideration for the opportunity to provide goods or services) or "support service contract[s]" (where the NAFI pays the contractor a fee or commission to provide the service). *Id.* at 377. No legal distinction was drawn between these two forms of contracts. After receiving the study, Congress amended the OFPPA to *remove* the appropriated-funds limitation on OFPP's authority. See Office of the Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 649.

term "procurement contract," it lists types of contracts that are "include[d]" within that term – such as "barter" arrangements – that involve the expenditure of neither "appropriated" nor "government" funds. FGCAA § 4 (now codified without substantive amendment at 31 U.S.C. § 6303).[11]

The NPS's remaining authorities are equally unhelpful. The FAR does not purport to define CDA applicability (see 48 C.F.R. pt. 33; cf. Resp. Br. 19) and did not include *any* definition of "procurement" until 2001.[12] And the definition

[11] The agency's claim (at 28-29) that its contracts are not similar to a bartering situation is both irrelevant and incorrect. It is irrelevant, in that the point is that no payment of government funds is required in a barter, and thus no such limitation should be read into the CDA. It is incorrect, because the NPS is misusing one phrase in *Institut Pasteur* v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) – "specific property" – to attempt to distinguish its contracts from a barter arrangement by pursuing a tangent about whether "the government's interest in a license before its issuance is * * * property" (Resp. Br. 29). But *Pasteur* is far removed from this case, involving what the Federal Circuit described as essentially a "donative" transaction. See 814 F.2d at 628. The terms of a concessions contract – unlike a strain of a virus that might cause AIDS – are clearly susceptible to valuation. In fact, if it were otherwise, bidding on such a contract would be difficult at best. (*G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992), is off point for a similar reason; it did not involve a *commercial* arrangement between the government and a private party.) And the claim that concessioners obtain only a license (Resp. Br. 29 (citing *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000))) is belied by the fact that concessions contracts are *contracts* – not merely permits or licenses to do business – under which concessioners perform specific services in the specific fashion required by the NPS. See Xanterra Br. 20-23. In fact, although under the National Park Service Organic Act, 39 Stat. 535 (codified at 16 U.S.C. §§ 1-4) and the 1965 Act the NPS was authorized to grant "privileges" and "permits" as well as contracts for visitor services (see 16 U.S.C. § 3), under the 1998 Act only "contracts" are now allowed. See *id.* § 5952.

[12] See Final Rule, 66 Fed. Reg. 2117, 2125 (Jan. 10, 2001) (adding definition, but only by cross-reference to "acquisition"). The term "acquisition" for FAR purposes has historically been limited to contracts involving appropriated funds (48 C.F.R. § 2.101), but is a term of art; it does not purport to be a general definition of "acquisition" for all government-contracting purposes.

of "acquisition" in RALPH C. NASH, JR. *ET AL.*, THE GOVERNMENT CONTRACTS REFERENCE BOOK 6 (2d ed. 1998) ("*Nash*"), which the NPS twice quotes (at Resp. Br. 11, 18), is explicitly derived from FAR § 2.101. See *Nash*, at 6.[13] But, as the preface to *Nash* explains, "[g]overnment contracting is complex, and *the rules cannot be gleaned from a single source such as the Federal Acquisition Regulation.*" *Id.* at vii (emphasis added).[14] Finally, 41 U.S.C. § 423(f)(4), which defines "Federal agency procurement" to be limited to appropriated-funds contracts (see Resp. Br. 18) was added in 1996 – 18 years after passage of the CDA – and in any event purports only to define that phrase for purposes of the section of the OFPPA that prohibits federal employees from disclosing nonpublic information about bids and proposals before the award of certain contracts. See 41 U.S.C. § 423(f)(4).

Having struck out in this hodgepodge of other statutes, the NPS reluctantly turns to the CDA itself to seek support for its newly-minted "government funds" limitation. See Resp. Br. 19, 25-27. But the only provision of the CDA that the agency grasps to rely upon – providing that agencies must reimburse the Judgment Fund for any damages award – does not help it. Although the cited section mentions *appropriated* funds, it was for a completely different purpose than suggested by the agency and, in any event, the NPS does not claim that the

[13] The implication in the NPS's brief (at 11) that *Nash* discusses the meaning of "procurement" *within the CDA* is misleading at best; the quote is merely *Nash*'s general definition of "acquisition."

[14] In fact, although *Nash* states that "acquisition" is synonymous with "procurement," it also includes several distinct definitions of "procurement" and "procurement contract" that undermine the NPS's argument here. According to *Nash*, procurement "means the acquisition * * * of personal property and nonpersonal services (including construction) from non-federal sources by such means as purchasing, renting, leasing * * *, contracting, bartering, and condemnation, donation, and requisition (but not by seizure)." *Id.* at 408 (emphases omitted). And a "procurement contract" is any "contract between the Government and a private party to provide supplies or services (including construction)." *Id.* at 409.

CDA is limited to such contracts. What the provision in fact says is that, when the government pays a claim under the CDA from the Fund, the Fund must be reimbursed "by the agency whose appropriations were used for the contract out of available funds *or by obtaining additional appropriations for such purposes.*" 41 U.S.C. § 612(c) (emphasis added). Therefore, this provision does not imply that the contract itself must involve appropriated funds – an impossibility in the context of CDA sales contracts, CDA contracts with NAFIs, or CDA contracts involving a barter. Rather, the purpose of this provision is "to assure that the total economic cost of procurements is charged to [the relevant] programs." See S. REP. NO. 95-1118, at 33. In other words, this provision simply uses a shorthand to clarify that the defendant agency is ultimately responsible for any successful claim.

Finally, noticeably absent from the NPS's brief is any explanation for *why*, for CDA purposes, it should matter whether "government funds" are expended. The NPS concessions program involves contracts generating over $800 million of revenue each year. See NPS Lodging, at 6. There is no reason Congress should have wanted to deny concessioners the CDA's protections when disputes over these government contracts arise. Unlike the situation in most of the cases cited by the NPS – where the government was merely giving funding support to a contract entered into between two nongovernmental parties – a concessioner's sole recourse for the breach of a concessions contract is to the NPS, its contracting partner.

B. CDA Coverage Does Not Depend On Who May Be Said To "Benefit" From A Government Contract.

The NPS's argument that the CDA is implicitly limited to contracts for goods and services "by and for the direct use and benefit of the federal government" (Resp. Br. 27) is similarly supported only by moonbeams. Although NPS concessions contracts in fact satisfy such a test (see Part III, *infra*), the law does not require that they do so.

The agency again relies on other statutes and regulations that were *expressly* limited to procurements "for the use of" the federal government and asks this Court to *impute* the same limitation into the CDA. But the presence of that phrase in one location and its absence in another must have some legislative significance. See *Barnhart*, 534 U.S. at 439-440; *Hohn*, 524 U.S. at 250.[15] And again, several of these statutes and regulations do not include this limitation. See, *e.g.*, 41 U.S.C. § 423(f)(4); 10 C.F.R. § 851.102 (1948); 41 C.F.R. § 1-1.208 (1960). Furthermore, each of the statutes that the government cites for this limitation uses differing phraseology,[16] yet the NPS seeks to extract a common meaning from them. And the agency offers no serious explanation for what would lead a contract to be "for the direct use and benefit of the federal government" (cf. Pet. Br. 32) nor why Congress would *want* to exempt government contracts from the CDA based on this criterion. Instead, it stresses only what it wants that phrase not to include – NPS concessions contracts.[17]

---

[15] Thus, the government's reliance on the ASPA (Resp. Br. 21), FPASA (Resp. Br. 22), and FAR (Resp. Br. 19), which are limited to such contracts – and on *Nash*, which merely parrots the FAR – is misplaced.

[16] Compare ASPA ("for the use of" agency) (Resp. Br. 21); Pub. L. No. 91-129, § 1, 83 Stat. 269 ("by and for the executive branch") (Resp. Br. 22); FGCAA ("for the direct benefit or use of the Federal government") (Resp. Br. 25). It seems that the purpose of the earliest such phrase – in the ASPA – was merely to clarify that the act applied to "one agency purchasing, or making contracts for, the use of other agencies" (S. REP. NO. 80-571, 1947 U.S.C.C.A.N. 1048, 1053), rather than to limit coverage based on who may be said to "benefit" from a procurement. The NPS also mysteriously changes the disjunctive test in the FGCAA ("direct benefit *or* use") to a conjunctive test ("direct use *and* benefit") (Resp. Br. 27).

[17] The NPS is disingenuous to suggest (at Resp. Br. 30 n.14) that *Yosemite Park* and *Total Medical* do not support our argument. We have never disputed that these cases involved the expenditure of government funds, but that is a distinct issue from whether the contracts at issue were for the "direct benefit" of the federal government. And the line the NPS attempts to draw between *Total Medical* and this case – that the contract in *Total Medical* was to benefit federal employees – has no basis; benefiting federal employees is no more or less a benefit to the government than procuring required services for visitors to a national park. See Part III, *infra*.

Similarly, the ASBCA cases (Resp. Br. 30 n.14; Pet. Br. 25-26) demonstrate that other agencies view concessions contracts to be covered by the CDA. The NPS describes *Hernandez* misleadingly; the Board there explained that "the primary function" of a contract with a "bagger" at a commissary "was to obtain services * * * *for all of [the agency's] customers*, which was a direct benefit to the Government." See ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742, at *8-9 (Dec. 12, 2000). This is indistinguishable from a NPS concessions contract.

The only support for the NPS's "direct-benefit" limitation that warrants any significant rebuttal is the FGCAA, which, as the NPS explains, instructs agencies to use procurement contracts "whenever the principal purpose of the instrument is to acquire, by purchase, lease, or barter, of property or services *for the direct benefit or use of the Federal Government*." FGCAA § 4 (emphasis added) (now codified without substantive amendment at 31 U.S.C. § 6303); Resp. Br. 25. Contrary to the NPS's assertion, this provision suggests that the CDA is *not* limited to such contracts. Again, the CDA does not use the term "procurement contract." See page 4, *supra*. Furthermore, the FGCAA demonstrates that Congress *could* have limited the CDA to contracts "for the direct benefit or use" of the government *had it chosen to do so*; by not repeating the FGCAA's language in the CDA, Congress certainly was not inviting the courts to import the omitted phrase. See, *e.g.*, *Barnhart*, *Hohn*, *supra*.

In any event, the NPS has quoted the FGCAA's reference to procurement contracts selectively and has ignored that statute's purpose. The FGCAA was intended to "rational[ize]" the "Federal assistance system." S. REP. NO. 95-449, at 6, 1978 U.S.C.C.A.N. 11, 16; see also 3 COMMISSION REPORT at 153-157. It instructs federal agencies when to employ "grant agreements" or "cooperative agreements" instead of "procurement contracts." See S. REP. NO. 95-449, at 2, 8; *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). Under the FGCAA, grant agreements and cooperative agreements are to be used when "the principal purpose of the relationship is the

transfer of money, property, services, or anything of value to the [recipient] in order to accomplish a public purpose of support or stimulation authorized by Federal statute." FGCAA §§ 5(1), 6(1) (codified at 31 U.S.C. §§ 6304, 6305). Paradigmatic examples of such grants are federal highway funds and agricultural price supports. See 3 COMMISSION REPORT 155, 175.[18] By contrast, procurement contracts are to be used "(1) whenever the principal purpose of the instrument is to acquire, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; *or (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate*." FGCAA § 4 (emphasis added) (now codified without substantive amendment at 31 U.S.C. § 6303).

Thus, the FGCAA does not limit government agencies' use of "procurement contracts" to instances where there is a "direct benefit" to the government; that is only one instance where they can use such contracts. Furthermore, as OMB explained in its regulations implementing the Act, the FGCAA "does not cover all possible relationships that may exist between Federal agencies and others. For example, the sale, lease, license, and other authorizations to use Federal Property, when not for the purpose of support or stimulation, are not within the scope and intent of [the FGCAA]." Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224); Final OMB Guidance, 43 Fed. Reg. 36,860, 36,862 (Aug. 18, 1978). Even the NPS does not claim that its concessions contracts are grants or cooperative agreements.[19] Whether NPS concessions contracts are "procurement contracts" under the FGCAA, or simply do not fall within its trichotomy at all,[20] is not relevant to this litigation; the coverage of the CDA does not turn on classification under the FGCAA.[21]

[18] The difference between a "grant agreement" and a "cooperative agreement" under the FGCAA is whether there is "substantial involvement" by the executive agency in the "performance of the contemplated activity." FGCAA §§ 5(2), 6(2) (codified at 31 U.S.C. §§ 6304, 6305).

[19] As the agency acknowledges, it has long "disavowed any interest in 'assisting' the concessioner under the FGCAA." Resp. Br. 37 (quoting *R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at *24 (Mar. 24, 1989).

Finally, the NPS (at 35 n.18) misses the point of our discussion of the Long Term Care Act, which demonstrates that a direct benefit to the government is unnecessary for CDA coverage. Congress did not "indicat[e] doubt that the CDA would have applied of its own terms" to contracts under the Act (Resp. Br. 35 n.18); quite the contrary, Congress *presumed* that the CDA would apply and statutorily tweaked the CDA's judicial review provisions. See Pet. Br. 30.

In sum, the NPS's attempt to introduce a "direct use and benefit" test into the CDA has no basis. Even if the NPS could show that its concessions contracts procured a benefit *only* for the general public, the CDA would still apply. But in fact, as we discuss below, NPS concessions contracts also procure a direct and substantial benefit for the agency.

III. NPS CONCESSIONS CONTRACTS PROCURE A DIRECT BENEFIT FOR THE GOVERNMENT.

We demonstrated in our opening brief (at 33-35) that the

[20] Cf. Dep't of Interior, 505 Departmental Manual 2.3(B) (exempting concessions contracts from regulation to determine into which of the FGCAA's three categories a given contract falls) (available at http://-elips.doi.gov/elips/release/3080.htm).

[21] Case law demonstrates that a contract's classification under the FGCAA is irrelevant to the applicability of various other federal procurement statutes, including the CDA. See, *e.g.*, *Trauma Serv. Group* v. *United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (disagreeing with Court of Federal Claims' conclusion that a "Memorandum of Agreement" between CHAMPUS and a medical provider, as a cooperative agreement, could not be a contract for purposes of Tucker Act jurisdiction); *Total Med. Mgmt., Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (finding CHAMPUS Memorandum of Agreement to be covered by CDA); *Henke* v. *U.S. Dep't of Commerce*, 83 F.3d 1445, 1450-1453 (D.C. Cir. 1996) (holding Privacy Act, which covers "federal contracts," to apply to grant agreements).

NPS directly benefits from its concessions contracts, in that concessioners provide visitor services that the NPS is obligated by statute to offer – services that, but for concessioners, the agency would be forced to provide itself. As this Court has explained, "[t]he Secretary of the Interior is responsible for maintaining our national parks, and for providing facilities and services for their public enjoyment *through concessionaires or otherwise*." *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 187 (1968) (citing 16 U.S.C. §§ 1, 17b, 20 (1964 ed. and Supp. III)) (emphasis added). Thus, even if only contracts "'for the direct benefit or use'" of the NPS were covered by the CDA (Resp. Br. 30 (quoting FGCAA § 4)), NPS concessions contracts would easily qualify.

To avoid this result, the agency ignores the text of its own controlling statutes. Although the NPS acknowledges that the Organic Act mandates that it "provide for the enjoyment" of the national parks (16 U.S.C. § 1), it never references the critical language in the 1998 Act – which is substantively identical to the 1965 Act before it – that the agency *must* provide "accommodations, facilities, and services * * * that are necessary and appropriate for public use and enjoyment" of the national parks (16 U.S.C. § 5951(b)(1)) and that it is *required* to "utilize concessions contracts" when hiring private parties to provide these services (*id.* § 5952). Thus, the NPS simply wishes away the sections of its controlling statutes that prove that the agency can enter into a concessions contract only if that contract serves the agency's mission. Nor does the NPS address the other agency materials that we cited (Pet. Br. 34-35), which demonstrate that the agency is receiving a direct benefit under its concessions contracts.

1. The NPS (at 34-36) cites a few cases to prop up its novel assertion that assisting an agency in fulfilling its mission is not a "direct benefit or use" to that agency for purposes of the CDA. But these cases prove nothing of the kind. For example, *Delta Steamship Lines, Inc.* v. *United States*, 3

Cl. Ct. 559 (1983), is easily distinguishable; as the Claims Court explained, the contract there was for "the payment of a subsidy for construction of a vessel purchased by a private party *for its own use*," not for the public's or the government's use (*id.* at 569) (emphasis added).

Blanco-Mora Enterprises, Inc., HUDBCA No. 94-G-136-C5, 94-3 BCA ¶ 26,974, 1994 WL 248163 (June 10, 1994), is similarly off point; its conclusion that the CDA does not apply to contracts that are "basically grant or sociological type contracts designed to accomplish Government social policy goals" (*id.* at *4) means at most that grants and cooperative agreements are not covered by the CDA – but that is irrelevant here. See note 19, *supra*. Nothing in *Blanco-Mora* suggests that binding contracts that assist an agency in accomplishing its statutorily mandated mission, such as NPS concessions contracts, are excluded from the CDA.

Finally, the contract at issue in *New Era Construction* v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989), was not covered by the CDA for the straightforward reason that the United States was not a party to that contract. See *id.* at 1154. Rather, the contractor entered into (and sought CDA protection under) a construction contract with the independent housing authority of an Indian tribe, which in turn had a *separate* financing contract with the Department of Housing and Urban Development. See *ibid.* Nothing in *New Era* addresses what is a "direct benefit" to the government. In any event, any implicit limitation the NPS seeks to extract from *New Era* was later rejected by the Federal Circuit itself, which, in *Total Medical*, 104 F.3d at 1320, held that contracts under which a contractor assists the government in fulfilling a legal obligation *are* covered by the CDA.[22]

---

[22] The authorities that the NPS relegates to a footnote (Resp. Br. 36 n.19) in support of this proposition warrant no more than a footnote in return. *Janowsky* v. *United States*, No. 92-5004, 1993 WL 36863, at *2-3 (Fed. Cir. Feb. 17, 1993), is both irrelevant – there was no claim that the contract was for a statutorily-mandated task – and misleading – *the gov-*

2. Given its statutory mission, the NPS must (and does) procure a "direct benefit" under *all* of its concessions contracts.[23] The details of specific concessions contracts, and in particular differences between "Category I" and Category II or III contracts (Resp. Br. 6 n.3, 33-34), are beside the point.[24] For example, the "Category III" contract included in the NPS's Lodging (at 11-50) explains that this contract was entered into "to provide for the public enjoyment of" the park (Lodging 14 (paraphrasing 16 U.S.C. § 5951(a))) and that the visitor services authorized under that contract "are necessary and appropriate for the public use and enjoyment" of that park (*ibid.* (paraphrasing 16 U.S.C. § 5951(b))).

That no services were *required* under this contract (Lodging 16) is also irrelevant; the "[s]port hunting guide services" (*ibid.*) "authorized" by that contract are, *according to the agency itself*, necessary for the public's use and enjoyment of the Denali National Preserve. Presumably, the contract did not require this particular contractor to offer such services during any specific period because others also offer similar visitor services in the area under their own concessions contracts, or because these contractors could be replaced easily.[25]

---

ernment there argued for CDA coverage. And *Winstar Corp.* v. *United States*, 21 Cl. Ct. 112, 117 (1990), contains nothing more than a conclusory statement about CDA coverage.

[23] The NPS states at one point that "services 'for the direct *benefit or* use' of the National Park Service" (Resp. Br. 30 (quoting 31 U.S.C. § 6303) (emphasis added)) would suffice for CDA coverage, but then concludes that "the government receives [no] 'direct ... use'" of such services (Resp. Br. 31 (quoting 31 U.S.C. § 6303) (omission in original)). Even if this were true, however, nowhere does the agency explain why services for the "direct benefit" of the agency should not also suffice even under its interpretation of the CDA. Nor does it explain its intermittent insistence that only services for the "direct use *and* benefit" (Resp. Br. 27 (emphasis added)) of the agency would qualify. See note 16, *supra*.

[24] The two "Permits" included in the NPS's Lodging (at 51-60 and 61-91) were issued before the 1998 Act was operative; under the 1998 Act no new concessions permits will be granted. See note 11, *supra*.

[25] The NPS's website lists two businesses offering sport hunting trips in Denali, as well as six mountain guides, three hiking guides, and numerous dog-sled and air-taxi services. See http://www.nps.gov/dena/home/-visitorinfo/concessions/concessionslist.html. The NPS also benefits under this contract because the concessioner is required to pay the NPS a fee *regardless* of whether it in fact provides visitor services in any given period. See Lodging 21.

In such an instance the NPS may not care *who* among its contractors provides required services, but the services themselves are necessary to the agency's mission, and thus are for the "direct benefit" of the NPS.

The point here is that before the NPS can even *issue* a concessions contract, it must find that the concessioner under that contract will provide services necessary to the agency's mission. Thus, *even if* a direct benefit to the government is required for CDA coverage, as the NPS asserts, this finding suffices. *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366 (1993), is not persuasive authority to the contrary. Cf. Resp. Br. 30. Beyond having nothing to do with the CDA (see Pet. 13), and mistakenly calling a concessions contract a permit (28 Fed. Cl. at 392 n.23), *YRT* focuses on the significance of the payment of government funds, rather than on who "benefits" under such a contract (see *ibid.*).

3. The NPS's argument (Resp. Br. 32-33) that the CDA does not encompass contracts involving the construction or maintenance of facilities *owned by the government* – which most or all Category I or II contracts entail (see Resp. Br. 6 n.3) – is frivolous. Because these contracts so plainly involve a benefit for the government itself, the NPS is forced to contend that they do not fall within the CDA because that is not their "primary" (Resp. Br. 32) or "principal" (Resp. Br. 33) purpose. Cf. Resp. Br. 11, 17-19, 21-24, 29. But the agency provides no rationale for this even more bizarre implied limitation on CDA coverage; its one Georgia Court of Appeals decision has nothing to do with the CDA, and it is well established that a traditional lease *is* covered by the

CDA. See Pet. Br. 15 n.6.[26]

4. Finally, the agency's contention (Resp. Br. 37) that it has no obligation to accommodate visitors in the national parks – and thus that concessioners do not assist it in fulfilling its statutory mission – is quite remarkable. If the NPS did not use concessioners to provide visitor services in the national parks, it would have to provide these services itself. The NPS must "provide for the enjoyment of" the national parks (16 U.S.C. § 1), and may enter into concessions contracts only if it finds them to be "*necessary* and appropriate" (16 U.S.C. § 5951(b)(1) (emphasis added)) for this task. See page 16, *supra*. Just because, for obvious reasons, the NPS does not feel the need to employ concessioners to provide visitor services in many of the smaller units under its jurisdiction (Resp. Br. 37), the agency cannot plausibly claim that it could ignore its controlling statutes and provide no visitor services in Yellowstone, Yosemite, Acadia and the dozens of other major parks that cater to millions of visitors each year.

Thus, even if a service must "direct[ly] benefit" the government for it to fall within the CDA, NPS concessions contracts plainly satisfy this criterion.

CONCLUSION

The judgment of the court of appeals should be reversed.

---

[26] The NPS's assertion that the claim in this case involves only a facial challenge (Resp. Br. 33) – an argument the agency never made below – gains it nothing. Under the NPS's own "Standard Concessions Contract," 65 Fed. Reg. 26,052 (May 4, 2000) and "Simplified Concession Contracts," 65 Fed. Reg. 44,894 (July 19, 2000), NPS concessions contracts will *necessarily* be covered by the CDA. Therefore, the NPS regulation purporting to exempt all of its contracts from the CDA is arbitrary or capricious. Even if the Court were to find that, based on these standard contracts, only some subset of NPS concessions contracts are covered by the CDA, the regulation categorically exempting *all* such contracts would still be contrary to law and thus facially invalid. Unlike *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), there are no factual questions to analyze here.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

FEBRUARY 2003

Supreme Court, U.S.
FILED

FEB 25 2003

OFFICE OF THE CLERK

(9)

No. 02-196

In the
Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR RESPONDENT XANTERRA PARKS & RESORTS, LLC SUPPORTING PETITIONER

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1400
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Respondent Xanterra Parks & Resorts, LLC

February 25, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

29 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 2

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA 2

II. THE NPS REGULATIONS ARE CONTRARY TO THE CDA'S PLAIN TERMS 4

A. The "No Circumstances" Test Does Not Apply 5

B. Concession Contracts Are Subject To The CDA Because They Are Contracts With An Executive Agency For Procurement Of Visitor Services 9

1. Concession Contracts, Unlike Permits, Generally Impose Affirmative Performance Obligations 10

2. Concession Contracts Provide Direct Benefits To The NPS 12

3. The NPS Should Not Be Permitted To Deprive Concessioners Of The CDA's Essential Protections 13

III. THE NPS HAS NO LEGITIMATE REASON FOR EXEMPTING CONCESSION CONTRACTS FROM THE CDA 16

A. The CDA Does Not Require Payment Of Government Funds 17

B. Other Procurement Laws Do Not Necessarily Apply To NPS Concession Contracts 18

C. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant 19

CONCLUSION 20

* A Rule 29.6 Statement was included in Xanterra Parks & Resorts, L.L.C.'s opening brief, dated December 27, 2002.

TABLE OF AUTHORITIES

Page(s)

Cases

American Hosp. Assoc. v. NLRB,
499 U.S. 606 (1991) 6

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 20

Brock v. Cathedral Bluffs Shale Oil Co.,
796 F.2d 533 (D.C. Cir. 1986) 3

Brown v. Gardner,
513 U.S. 115 (1994) 19

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 18

Christensen v. Harris County,
529 U.S. 576 (2000) 4

INS v. National Ctr. for Immigrant Rights, Inc.,
502 U.S. 183 (1991) 7

Jett v. Dallas Indep. Sch. Dist.,
491 U.S. 701 (1989) 18

Kelley v. EPA,
15 F.3d 1100 (D.C. Cir. 1994) 4

Lorillard v. Pons,
434 U.S. 575 (1978) 20

Los Angeles Police Dept. v. United Reporting Publ'g Corp.,
528 U.S. 32 (1999) 8

Lyng v. Payne,
476 U.S. 926 (1986) 2

Motion Picture Ass'n of Am., Inc. v. FCC,
309 F.3d 796 (D.C. Cir. 2002) 4

Motor Vehicle Mfrs. Assoc. v. State Farm,
463 U.S. 29, 43 (1983) 9

National Mining Ass'n v. Army Corps of Eng'rs,
145 F.3d 1299 (D.C. Cir. 1998) 6, 8

National Park Concessions, Inc.,
No. 2995,
1994 WL 462401 (IBCA Aug. 18, 1994) 20

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969) 20

Reno v. Flores,
507 U.S. 292 (1993) 6, 7

Rust v. Sullivan,
500 U.S. 173 (1991) 7, 8

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 3, 6, 9

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 3, 6

Sullivan v. Zebley,
493 U.S. 521 (1990) 7

Thomas v. New York,
802 F.2d 1443 (D.C. Cir. 1986) 3

United States v. Morrison,
529 U.S. 598 (2000) 8

United States v. Salerno,
481 U.S. 739 (1987) 6

United States R.R. Retirement v. Fritz,
449 U.S. 166 (1980) 9

Watch Hill Concessions, Inc.,
No. 4284-2000,
2001 WL 170911 (Feb. 16, 2001) 20

Zebley v. Heckler,
642 F. Supp. 220 (E.D. Pa. 1986) 7

Statutes and Regulations

5 U.S.C. § 706 2

National Parks Omnibus Management Act of 1998,
Pub. L. No. 105-391, 112 Stat. 3497
(codified with certain exceptions
at 16 U.S.C. §§ 5951-5966)

16 U.S.C. § 5951(b) 10

16 U.S.C. § 5952 18

16 U.S.C. § 5962 20

The Contract Disputes Act of 1978,
Pub. L. No. 95-563, 92 Stat. 2383
(codified at 41 U.S.C. §§ 601-13)

41 U.S.C. § 602 ..... 1, 9, 17

41 U.S.C. § 608 14

41 U.S.C. § 609 ..... 10, 13, 14, 16

41 U.S.C. § 611 14

41 U.S.C. § 612 17

44 U.S.C. § 1510 2

Concession Contracts,
65 Fed. Reg. 20,630 (Apr. 17, 2000) 5

Concession Contracts,
66 Fed. Reg. 35,082 (Jul. 3, 2001) 19

Simplified Concession Contracts,
65 Fed. Reg. 44,894 (Jul. 19, 2000) 3

Standard Concession Contract,
65 Fed. Reg. 26,051 (May 4, 2002) 2, 11, 12

1 C.F.R. § 8.1 2

36 C.F.R. § 51.1 2

36 C.F.R. § 51.3 ..... 3, 5

Other Authorities

Clarence Kipps, Tom Kindness, and Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585 (1991) 14, 16

Report of the Commission on Government Procurement (1972) 14, 15

S. Rep. No. 95-1118 (1978) 15

S. Ct. R. 32 16

The NPS cannot dispute that Congress has never delegated it authority to administer the CDA. Nor can it reasonably dispute that concession contracts are contracts for "the procurement of services," and many times, for "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a). The NPS's inability to respond to these points is dispositive.

Instead of addressing the CDA's plain language or responding meaningfully to the fundamental arguments made in the opening briefs, the Government sows confusion. What is perhaps most startling is how much of the Government brief is newly-minted. Documents never disclosed in the district court or court of appeals now appear as lodged materials. Arguments never made to, nor accepted by, either of the lower courts have come to the fore. And tangential statutes and remote congressional testimony, never cited in earlier stages of this litigation, nor relied on or even mentioned in either the NPS regulations or their preamble, are suddenly glued together to form a setpiece of supposed background understandings and limits on CDA applicability.

On examination, this tissue of diversionary information disintegrates. The Government, in the end, can find no reason why this Court should allow the NPS to fashion clever devices for exempting itself from the CDA and depriving its contractors of the rights and procedures the CDA guarantees. As explained in our opening brief, and in the NPHA's briefs, the NPS regulation declaring concession contracts CDA-exempt is invalid because it is made without delegated authority, and is fundamentally at odds with the plain meaning of the CDA itself. If accepted, the NPS's approach would pose mortal dangers not just to NPS concessions or businesses with government contracts, but to anyone who relies on federal statutes to protect their relationships with government agencies.

ARGUMENT

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA

For reasons explained in our opening brief, an administrative agency's power "is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Accordingly, because Congress has not given authority to the NPS to administer the CDA, the NPS may not issue binding regulations declaring concession contracts exempt from the CDA. *See* 5 U.S.C. § 706(2)(C). The Government nonetheless would ignore this dispositive point, responding only in a footnote. *See* NPS Br. 15 n.6. There, the Government suggests that the NPS regulation should be upheld as an "interpretive rule." *Id.*

This argument is fundamentally at odds with the understandings on which the NPS regulation rested when it was promulgated by the agency and defended in the courts below. The regulation, as promulgated, bears all the hallmarks of a substantive rule of binding, legal effect. It was published, together with dozens of other binding NPS rules, in the Code of Federal Regulations, which by statute contains only documents having "general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added); *see also* 1 C.F.R. § 8.1 (same). The regulation also is further incorporated as a non-negotiable and binding term in every concession contract. *See* 36 C.F.R. § 51.1 ("All concession contracts are to be consistent with the requirements of this part"); 65 Fed. Reg. 26,051, 26,065 (2002) ("This CONTRACT . . . [is] subject to all Applicable Laws"); 65 Fed. Reg. 44,894, 44,899 (2000) (same). No reasonable observer could have guessed at the time of promulgation that this particular regulation, as opposed to the sundry NPS

regulations published simultaneously and alongside, would later be defended as a mere, non-binding, "interpretive rule."

Moreover, in the courts below, the NPS vigorously contended that its regulation is legally binding. In particular, the NPS argued that its regulation is entitled to *Chevron* deference. *See* NPS D.C. Cir. Br. 48, 50. The Government now distances itself from that untenable position, but its new rationale was never invoked by the agency itself and, thus, provides no grounds for this Court to decide in favor of upholding the regulation. *See SEC v. Chenery Corp.* , 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

It bears mention that Xanterra has no quarrel with the notion that agency communications with the public are salutary. The NPS may at any time issue informal interpretive guidance—regarding CDA applicability or any other topic—via memoranda, website postings, *Federal Register* notices, or other means that create no implication that the agency is engaged in *making law*. But this NPS regulation, like every regulation, bears no resemblance to those sorts of non-binding interpretations. *See Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (Scalia, J.) (distinguishing substantive rules from interpretations, statements of policy, and rules of agency organization); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.). To the contrary, the regulation reflects the NPS's final, binding, categorical, and codified judgment that "[c]oncession contracts are not contracts within the meaning of [the CDA]." 36 C.F.R. § 51.3.

The Government suggests, to be sure, that not it but the D.C. Circuit first deemed its regulation an "interpretive rule" by declining to afford *Chevron* deference. *See* NPS Br. 16

n.6. But this also cannot be true. An "agency interpretation *contained in a regulation*" must be evaluated under "the framework of deference set forth in *Chevron*." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (emphasis added). Accordingly, given that this particular legal interpretation appears in the Code of Federal Regulations, the D.C. Circuit had but two choices—afford *Chevron* deference, or vacate as *ultra vires*.

As we explain in our opening brief, the D.C. Circuit's failure to appreciate this dichotomy is especially surprising. Prior to the decision below, that court had successfully applied this Court's precedents to invalidate codified regulations promulgated in an absence of delegated authority. *See, e.g., Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002); *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). Although the Government now asserts the irrelevance of those decisions (on grounds they involved "legislative regulations claimed to have the force of law," NPS Br. 16 n.6), in fact, the D.C. Circuit decision in *Kelley* expressly addressed—and rejected—the Government's precise argument here: that a codified agency regulation could be "sustained as an interpretive rule." 15 F.3d at 1108. In the absence of serious responsive analysis from the Government, this Court should take the same action—and vacate the NPS regulation as *ultra vires*.

II. THE NPS REGULATIONS ARE CONTRARY TO THE CDA'S PLAIN TERMS

Besides being *ultra vires*, the NPS regulation also reflects an impermissible construction of the CDA. The Government brief has no rejoinder on this point, elaborated on in both our opening brief and the NPHA's briefs, as it pays almost no heed to the CDA's actual language. The Government instead attempts to erect new doctrinal barriers

to judicial scrutiny, arguing that a facial challenge to the NPS regulation must fail if even one concession contract falls outside the CDA's scope. Likewise, the Government asks the Court to rewrite the CDA to include new, court-fashioned limitations. Both of these attempts to undermine the CDA should be rejected.

A. The "No Circumstances" Test Does Not Apply

From the first pages of its brief, the Government attempts to change the nature of this case. It reformulates the Question Presented to emphasize that this case involves a *facial* challenge, *see* NPS Br. (I), and then argues that, to prevail on a facial challenge, the NPHA and Xanterra "must establish that no set of circumstances exists under which the [regulation] would be valid." NPS Br. 33.

The NPS has never made this argument before—not in the administrative record, not in the district court, not in the court of appeals, and not in opposition to the NPHA's petition for certiorari. Indeed, the NPS has never admitted before now that *any* NPS concession contract might in fact fall within the CDA's scope. To the contrary, although Xanterra specifically raised an as-applied challenge to the NPS regulations as unlawful under the CDA, the Government did not differentiate in the lower courts between Xanterra's as-applied challenge and the NPHA's facial challenge. Instead, the NPS defended both challenges on the same grounds, taking the unbending position that concession contracts, *without exception*, "are not contracts within the meaning of" the CDA. 36 C.F.R. § 51.3; *see also* 65 Fed. Reg. 20,630, 20,635 (Apr. 17, 2000). Because this new argument now being pressed—that the NPS regulation should be upheld so long as one concession contract might fall outside the CDA's scope—was not "invoked by the agency," this Court is "powerless to affirm" on this basis.

SEC v. Chenery Corp. , 332 U.S. 194, 196 (1947); *see also SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

By pressing this newly-minted argument, moreover, the Government repudiates not only positions it took below, but also the D.C. Circuit's decision in its favor. The D.C. Circuit used a bold, aggressive (and fundamentally flawed) application of the "no circumstances" test set forth in *United States v. Salerno*, 481 U.S. 739 (1987), to reject facial challenges made by the NPHA and Xanterra to *other* NPS regulations challenged alongside the regulation governing CDA applicability. *See* Pet. App. 10a-14a; *see also National Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1407 (D.C. Cir. 1998). Despite its willingness to apply the "no circumstances" test to other challenges in the same case, however, the D.C. Circuit did *not* apply *Salerno* to the CDA challenge. *See* Pet. App. 27a-29a. It instead weighed that challenge without any reference to whether it was facial or as-applied.

The Government never explains its repudiation of the D.C. Circuit's decision in its favor, but instead cites dicta in *Reno v. Flores* stating that the "no circumstances" test applies to both constitutional and statutory challenges. *See* 507 U.S. 292, 301 (1993). But this dicta is taken out of context. *Reno* in fact reaffirms the principle, firmly grounded in doctrines of standing and ripeness, that a reasonable agency regulation should not be struck down merely because a petitioner "can point to a hypothetical case in which the rule might lead to an arbitrary result." *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 619 (1991); *see also INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991). *Reno* does not, as the Government would have it, turn this established principle on its head: The mere fact that an agency can point to a

hypothetical case in which its rule might be valid should not and does not shelter an unlawful regulation from facial invalidation. Indeed, *Reno* itself proves this point. *Reno* did not uphold the challenged regulation based on grounds of some failure to show invalidity in all circumstances. Instead, this Court applied normal administrative law principles, finding that the regulation had a "reasonable foundation" and "rationally pursue[d] a purpose that [was] lawful for the INS to seek." *Reno*, 507 U.S. at 309.

The *Reno* approach follows well-trodden paths taken by this Court in other cases involving APA challenges to agency regulations. In *Sullivan v. Zebley*, 493 U.S. 521 (1990), for example, the Court upheld a facial challenge to agency regulations, even though the regulations were clearly valid in some applications. Notably, the district court in *Zebley* had taken the contrary approach, holding that "errors in applying the regulations in some cases do not demonstrate invalidity of the regulations themselves." *Zebley v. Heckler*, 642 F. Supp. 220, 222 (E.D. Pa. 1986). This Court, by contrast, struck down the regulations as "manifestly contrary to the statute," despite the fact that more carefully drawn regulations might have validly regulated some of the same conduct. *Zebley*, 493 U.S. at 541.

Likewise, *Rust v. Sullivan*, 500 U.S. 173 (1991), considered a facial challenge on both constitutional and administrative law grounds to a Department of Health and Human Services regulation. Although the Court stated that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available," *id.* at 190, it did not apply the same "no circumstances" test to "petitioners' contention that the regulations exceeded the Secretary's authority under Title X and are arbitrary and capricious." *Id.* at 183. There, it

applied *Chevron*. The Court must have recognized, as the D.C. Circuit has correctly observed, that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial." *National Mining Assoc.*, 145 F.3d at 1407.

As *Rust* vividly illustrates, there is a fundamental difference between, on the one hand, a constitutional challenge to a statute or regulation, and, on the other, a challenge to agency regulations under the APA. In the constitutional context, "[d]ue respect for the decision of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). This "general rule reflects two 'cardinal principles' of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication." *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). This same due respect for Congress requires a much different approach, however, when regulations are challenged as contrary to law under the APA. In the APA context, the Court must test regulations against traditional administrative law doctrines to ensure that the agency is properly abiding by Congress's commands, not subverting them through unlawful or arbitrary regulations. *Cf. Chenery*, 318 U.S. at 94 (an agency "order may not stand if the agency has misconceived the law").

Under general administrative law principles, it is not enough that an agency regulation *might* be valid in some circumstances. While "the Court has never insisted" that Congress "articulate its reasons for enacting a statute," *United States R.R. Retirement v. Fritz*, 449 U.S. 166, 179 (1980), in the administrative context, the burden is squarely

on the agency to justify its regulations and to "clearly disclose and adequately explain[]" the grounds on which the agency acted. *Chenery*, 318 U.S. at 94. As the Court has emphasized, the agency itself must "examine the relevant data" and "articulate a *satisfactory explanation* for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assoc. v. State Farm*, 463 U.S. 29, 43 (1983) (emphasis added). Reasoned decisionmaking requirements are thus fundamentally inconsistent with the "no circumstances" test suggested by the NPS.

The Court should accordingly take this opportunity as an occasion to remind lower courts that a "no circumstances" test does not apply where, as here, an agency's regulations are directly challenged under the APA as contrary to law. In this regard, the Court should note that the NPHA and Xanterra are not challenging specific actions that the NPS might take pursuant to its regulation—but rather the unlawful contours of the legal categories the regulation creates on its face.

B. Concession Contracts Are Subject To The CDA Because They Are Contracts With An Executive Agency For Procurement Of Visitor Services

To ensure that government contractors have the same fundamental rights as parties involved in private contract disputes, the CDA applies to "any" contract entered into by "an executive agency" for "the procurement of services," or the "construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a). The Government attempts to avoid this plain language by narrowly defining the term "procurement." But for reasons set forth in the NPHA briefing, "procurement," as used in the CDA, easily encompasses contracts, such as NPS concession contracts,

that are the result of government solicitation, reduced to writings signed by both parties, and deemed by law as "necessary" to the fulfillment of the agency's mission. *See* 16 U.S.C. § 5951(b). The NPHA rightly emphasizes that NPS concession contracts constitute critical procurements (for CDA purposes) because of the NPS's reliance on them in carrying out its statutory mandate. *See* NPHA Reply 16.

The Government nonetheless continues to argue that concession contracts are mere permits, not "contracts" for "the procurement of services." NPS Br. 29. Likewise, the Government argues that concession contracts are exempt from the CDA because they are not executed for the government's direct benefit and use. For reasons stated in the NPHA briefing and those that follow, however, these distinctions are fanciful. Nothing in the Government brief can overcome Congress's clear command that the CDA applies "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1).

1. Concession Contracts, Unlike Permits, Generally Impose Affirmative Performance Obligations

Concession contracts—unlike permits—are affirmatively solicited by the NPS, subject to pervasive government oversight, and take the form of binding, bilateral contracts. In most cases, concession contracts also impose affirmative obligations to provide services. *See* Xanterra Br. 22. The current contract for concession services at the Grand Canyon is one example in that it, like most concession contracts, is far removed from the type of "permit" that the NPS would have the Court believe is the norm. The NPS not only *requires* Xanterra to provide the visitor services described on page 22 of the NPHA's opening brief, but is intimately

involved in almost every aspect of Xanterra's business operations. Xanterra must receive prior NPS approval for the services and merchandise it offers, and any promotional materials it uses. *See* Grand Canyon Contract § 3(d) (JA 77). Xanterra also must allow its employees to participate in certain NPS-designated volunteer programs; obtain NPS sign-off on the "design, artwork, layout, and selection of menu items;" and even seek prior NPS approval for the faceplates and color of its vending machines. *See id.* at 27-32

Performance of these obligations is mandatory. The NPS has authority under the contract to require Xanterra to "furnish appropriate forms of bonds" in order to ensure that Xanterra lives up to its contractual obligations. *See* Grand Canyon Contract § 13(a) (JA 104); *see also* 65 Fed. Reg. at 26,071. Should Xanterra fail to perform, Xanterra is required to pay "all damages or claims that may result," and the NPS has "at all times the first lien" on Xanterra's assets within the park. Grand Canyon Contract § 13(b) (JA 104-105); *see also* 65 Fed. Reg. at 26,071. Moreover, failure to perform to the NPS's satisfaction is grounds for termination at the NPS's sole discretion. *See* Grand Canyon Contract § 16(b) (JA 108).

In addition to requiring performance, the NPS has insisted that standard terms be included in Xanterra's contract for purposes of leaving an avenue for the NPS to assert that it may require Xanterra to undertake new performance obligations during the course of the contract. The Grand Canyon Contract is subject not only to NPS requirements, regulations, and policies "now in force," but also any requirements, regulations, or policies that may be implemented "in the future." Grand Canyon Contract §§ 2, 5 (JA 69, 80); *see also* 65 Fed. Reg. at 26,063. Under the

Contract, the NPS "reserves the right to determine and control the nature, type and quality" of visitor services. Grand Canyon Contract § 3(d) (JA 77); *see also* 65 Fed. Reg. at 26,064. According to the NPS, it may also, in its discretion, make modifications to the contract's Operating and Maintenance Plans. *See* Grand Canyon Contract § 3(c) (JA 76-77); *see also* 65 Fed. Reg. at 26,064.

Accordingly, because many NPS concession contracts, including Xanterra's, contain minutely detailed, pervasively policed, affirmative obligations, those contracts bear no relation to a permit or license. A permit-holder—unlike these NPS concessioners—has no affirmative obligation to perform; to the contrary, performance is entirely within a permit-holder's discretion.

2. Concession Contracts Provide Direct Benefits To The NPS

The Government also argues that in order to be covered by the CDA, a contract must be "by and for the direct use and benefit of the federal government." NPS Br. 27. As explained in the NPHA briefing, there is no basis for this extra-textual limit on CDA applicability. *See* NPHA Reply 11-15. The Government has not (and cannot) point to any language in the CDA supporting this inventive interpretative position.

Even assuming that the CDA could be rewritten to apply only to contracts "for the direct benefit of the government," however, NPS concession contracts clearly satisfy that test. The NPHA rightly emphasizes the NPS's affirmative, statutory obligation to provide visitor services. *See* NPHA Reply 16. Likewise, the millions in franchise fees paid annually to the government by concessioners were highlighted in our opening brief. *See* Xanterra Br. 27-28.

But further examples of benefits are also easy to identify. Under the Grand Canyon Contract, for example, Xanterra is required to provide reduced rates for lodging and transportation for Government employees. *See* Grand Canyon Contract § 3(f)(2) (JA 78). It also must maintain and provide staffing for a Recreation Center used by Xanterra and NPS employees (not the public) for dances, sports activities, fitness programs, computer access, movies and tape rentals. *See* Grand Canyon Contract, Operating Plan at 13. Finally, as we noted before, Xanterra is required to make approximately $8.5 million in improvements to buildings and structures inside national park boundaries. All of these mandatory activities inure directly to the benefit of the NPS and its employees.

3. The NPS Should Not Be Permitted To Deprive Concessioners Of The CDA's Essential Protections

Congress recognized that agencies, like the NPS, would have strong incentives to impose affirmative obligations on government contractors, either for their benefit, for the benefit of their employees, or for the benefit of others, such as national park visitors. Congress also recognized that, in imposing these obligations, agencies would often face the temptation of unfairly shifting costs onto their contracting partners. Congress thus gave clear statutory protection to the businesses from which the government procures services and construction, making clear that the CDA's protections apply "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1).

As we explained in our opening brief, because NPS concession contracts are subject to pervasive NPS oversight, and because the NPS may well attempt to impose new performance obligations on concessioners over the life of a

contract, it is not unusual for factual disputes to arise over questions of performance. It is precisely for this reason that the CDA's due process protections and uniform procedures are critically important. *See* Clarence Kipps, Tom Kindness, and Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585, 591-96 (1991) (discussing the CDA's "carefully balanced system for resolving disputes"). The NPS disputes this point, arguing that, even if the CDA does not apply, concessioners will still have their day in court. *See* NPS Br. 39. But this would send NPS contracting back to the archaic pre-CDA era, in which concessioners were largely deprived of (among other things) prejudgment interest, *see* 41 U.S.C. § 611, *de novo* review of agency contracting decisions before independent tribunals, *see id.* § 609(a)(3), and access to accelerated procedures for resolving smaller claims, *see id.* § 608.

Indeed, as the Government is forced to concede, the availability of prejudgment interest is central in a contracting regime, like the NPS's, in which one party is not entitled to refuse performance in response to additional demands made by the government. The Government thus admits that Congress intended that government contractors should recover prejudgment interest if they are contractually required "to perform the work as directed by the government without stopping to litigate." NPS Br. 38 (quoting *Report of the Commission on Government Procurement* (1972)). The reasons for this policy are set forth in the Government brief:

> Since the contractor has been compelled to perform the work with its own money . . . there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.

Id. at 38-39. This policy is clearly applicable to the world of NPS concession contracting. NPS concessioners may be, and often are, "compelled to perform" under their contracts while a dispute simmers over NPS demands for more benefits or services, or changes to existing benefits or services. In such situations, the Government appears to recognize that "there can be no equitable adjustment" until the concessioner "recovers the entire cost of the additional work," including prejudgment interest. The CDA thus ensures that the NPS cannot prevent concessioners from fully recovering the true costs of complying with NPS-imposed performance obligations.

Equally important, were this Court to accept the Government's invitation to return NPS contracting to the pre-CDA era, the NPS would again be able to "circumscribe . . . access" to courts. S. Rep. No. 95-1118, at 5 (1978). Because the "methods and forums for handling" concession contract disputes might once again become mostly a matter of "executive fiat," *id.* at 2, the NPS might well decide to replace the IBCAs with agency officials as the arbiters of concession disputes, and adopt dispute resolution procedures wholly lacking "the procedural safeguards and other elements of due process that should be the right of litigants." *Id.* at 4. Instead of *de novo* review in an independent forum, decisions would likely be reviewable only under the deferential "arbitrary and capricious" standard. *See* Kipps. *et al.*, *The Contract Disputes Act*, 4 Pub. Contract L.J. at 591 (the CDA was designed to "release[] contractors from the limited confines of administrative law").

Allowing the NPS to circumvent the CDA would therefore not only contradict Congress's express intention that the CDA should apply "notwithstanding . . . any regulation . . . to the contrary," 41 U.S.C. § 609(a)(1), but also, more fundamentally, pose wider dangers to the CDA's usefulness as the answer to agency overreaching.

III. THE NPS HAS NO LEGITIMATE REASON FOR EXEMPTING CONCESSION CONTRACTS FROM THE CDA

The Government tries to cover its lack of meaningful responses to the opening briefs with a single (and easily unmasked) textual argument, a mantle of new citations to newly-invoked statutes, and unreliable legislative history. The purpose of these side discussions may be to distract attention from the CDA's plain meaning and sow confusion in its stead.

Before addressing these diversions, it bears mention that the Government's advocacy in this case has been unusually evasive. An example is the over 90 pages of extra-record materials lodged by the NPS. At earlier stages of this litigation, the NPS resisted discovery on the grounds that it had already provided the *entire* administrative record. It accordingly should not be permitted now, at this late date, to rely on documents that it has never before disclosed or relied on. *See* S. Ct. R. 32 (limiting a party's right to lodge non-record materials) The NPS brief also contains an unsettling quantity of miscitation and selective quotation. Numerous examples are identified above and in the NPHA's reply brief. *See* NPHA Reply 9 n.11 (misuse of phrase); *id.* 10 n.13 (misleading quote); *id.* 11, 13 (selective quotations); *id.* 13 n.17 (misleading description). Taken together, these examples provide a clear warning that the Court should turn

a wary eye to each and every contention made by the Government.

A. The CDA Does Not Require Payment Of Government Funds

When the Government places substantial reliance on CDA text—for the one and only time—it observes that reimbursements to the Judgment Fund for monetary awards are paid out under the CDA "by the agency whose appropriations were used for the contract." NPS Br. 19 (quoting 41 U.S.C. § 612(c)). Based on this text, the Government asserts that "only contracts involving the payment of government funds constitute 'procurement'" for CDA purposes. *Id.*

As the NPHA explains, however, the Government quotes selectively—the CDA in fact states that reimbursements must be made "by the agency whose appropriations were used for the contract out of available fund *or by obtaining additional appropriations for such purposes*." 41 U.S.C. § 612(c) (emphasis added). When the CDA is quoted in full, the Government's argument falls apart. *See* NPHA Reply 11. Indeed, because the CDA applies to contracts for "the disposal of personal property," 41 U.S.C. § 602(a)(4), it is clear that, notwithstanding the Government's unfounded assertions, Congress expressly intended the CDA to apply to a whole category of government contracts under which the government is *receiving payment*, rather than *making payment*. In contracts for disposal of personal property, similar to NPS concession contracts, funds flow in one direction—into government coffers, not out of them. Nonetheless, the CDA's plain language makes clear that the CDA applies to such contracts, notwithstanding the Government's repeated insistence that the government must *pay* in order for the CDA to apply.

B. Other Procurement Laws Do Not Necessarily Apply To NPS Concession Contracts

As we noted before, the Government quickly retreats away from any statutory text and into an extended, confusing argument by analogy that invokes over a half a century of government procurement law. The Government argues at bottom that it would be "untenable" to apply the CDA to concession contracts because concessioners are not "subject to *any other* government procurement law." NPS Br. 20.

These *other* procurement laws are, of course, not before the Court. Even if they were, however, the Government's extended reliance on *other* procurement law must fail. Unlike the CDA, other procurement-related statues apply largely to the solicitation, bidding, and formation of government contracts. But significantly, the Concessions Management Improvement Act of 1998 ("1998 Act") sets forth a comprehensive and reticulate scheme specifically governing the solicitation, bidding, and formation of NPS concession contracts. *See* 16 U.S.C. § 5952(1) (competitive selection process); § 5952(2) (solicitation of proposals); § 5952(3) (issuance of prospectus); § 5952(4) (minimum bid requirements); § 5952(5) (criteria for contract award). Hence, the 1998 Act displaces many or all of the generally applicable statutes that would otherwise apply. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333-39 (D.C. Cir. 1996) (canvassing this Court's precedents and finding that a Procurement Act Executive Order was displaced by the National Labor Relations Act); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 702 (1989) (noting the "general principle that a precisely drawn, detailed statute pre-empts more general remedies").

The CDA (unlike other procurement statutes) governs dispute resolution, an area of government contracting not

comprehensively addressed in the 1998 Act. Accordingly, although the 1998 Act may well displace other procurement laws, Congress has not chosen to displace the CDA or other generally applicable dispute resolution statutes. Indeed, the NPS has already conceded that the other notable, generally applicable dispute resolution statute, the Administrative Disputes Resolution Act, applies to NPS concession contracts. *See* 66 Fed. Reg. 35,082, 35,082 (2001) (clarifying that neither the NPS regulations nor Standard Concession Contract are exempt from the ADRA). It is not "untenable," as the Government suggests, to treat the CDA differently from other procurement laws; it is exactly what Congress intended.

C. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant

The Government brief closes with a discussion of legislative history. For reasons explained in our opening brief, whatever role legislative history might ordinarily play in statutory interpretation, orphaned statements planted in the 1998 Act deserve no weight. *See* Xanterra Br. 28-30. The Government argues that the legislative history "reflect[s] Congress's conscious design . . . that the Act and regulations issued thereunder *alone* governed concession contracts." NPS Br. 49. The Government thus argues that legislative silence as to the NPS's view that concession contracts are not subject to the CDA "ratified that understanding." *Id.* But there is no support for this view. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994) (when "the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction").

Indeed, if legislative history is relevant at all, it supports the NPHA and Xanterra, not the NPS. It is indisputable that Congress knew how to exempt NPS concession contracts

from other statutes, *see* 16 U.S.C. § 5962, but nonetheless did not address the CDA in the 1998 Act. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (when Congress knows how to make its intent explicit, the absence of express authorization weighs heavily against finding that any authorization was granted). And if, as the Government argues, Congress was aware of the NPS's long-standing attempts to break free from the CDA, then, by this same logic, it must also have been aware of the binding decisions that nonetheless kept the NPS tethered to its CDA obligations. *See, e.g., Watch Hill Concessions, Inc.*, No. 4284-2000, 2001 WL 170911, *6 (IBCA Feb. 16, 2001); *National Park Concessions, Inc.*, No. 2995, 1994 WL 462401 (IBCA Aug. 18, 1994); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Against this backdrop, Congress's failure to pass legislation overturning these binding decisions (which had rendered the NPS's contrary view a dead letter) is further evidence that "the Committee's report language was merely an accommodation to NPS." *Watch Hill*, 2001 WL 170911, at *6; *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent").

CONCLUSION

For these reasons, as well as those set forth in our opening brief and the NPHA's briefs, this Court should hold that the CDA applies to concession contracts, reverse the judgment of the court of appeals, and vacate the NPS's regulations.

Respectfully submitted,

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1400
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Respondent
Xanterra Parks & Resorts, LLC

February 25, 2003